IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-421

JOHN M. BRYANT, et al.,
Petitioners,
vs.
BEN YELLEN, et al.,
Respondents.

No. 79-425

STATE OF CALIFORNIA, et al.,
Petitioners,
vs.
BEN YELLEN, et al.,
Respondents.

No. 79-435

IMPERIAL IRRIGATION DISTRICT, et al.,
Petitioners,
vs.
BEN YELLEN, et al.,
Respondents.

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Public Advocates

"Everybody knows that the West is the Land of Little Rain, the arid country, where land will not grow crops unless it is irrigated, where water has exactly the value of blood."

Bernard DeVoto, *Harper's Magazine*, Oct. 1951, at 73.

INTRODUCTION

Amici address the social, economic, and legal context of this unusual case. Only rarely has the Court scrutinized the legal interface of water and the arid country which is the object of the general reclamation laws in the seventeen[1] Western states. Because of the special expertise[2] which *amici* marshal upon the origins and viability of family-sized agriculture as a national imperative and the direct consequences of this Court's decision on the lives of members and clients of *amici* organizations, the following brief is respectfully submitted. It is filed without a motion, as is permitted by Rule 42(2) of this Court, the prior consent of the parties having been obtained. Those letters of consent are being sent directly by the parties to the Clerk of the Court.

INTEREST OF THE AMICI

Amicus Pedro Duarte and Antonia Casarez reside in the Imperial Valley and would like to purchase excess lands

1. Various sources use conflicting numbers, the correct count is seventeen as Texas was added to the original sixteen in § 1 of the Reclamation Act of 1902 (Ch. 1093, 32 Stat. 388) by the Rio Grande Reclamation Project Act, Ch. 798, 33 Stat. 814 (1905).

2. While amici have gone to original legislative materials as well as established works of academic scholarship, much of the groundwork in this brief was first laid or foreshadowed in the accumulated adjudications of the U.S. Court of Appeals for the Ninth Circuit which has with great deliberation and consistency reviewed the sundry aspects of the reclamation laws and ordered fulfillment of the family-sized farm protections of these laws. *State of California v. Rank,* 293 F.2d 340 and 307 F.2d 96 (1961) (per Hamlin and Merrill with District Judge Powell) aff'd in part and rev'd in part *sub nom Dugan v. Rank,* 372 U.S. 609 (1963); *Turner v. Kings River Conservation District,* 360 F.2d 184 (1966) (per Hamlin, Browning, and Duniway); *U.S. v. Tulare Lake Canal Company,* 535 F.2d 1093 (1976) (per Browning, Duniway, and Wallace), *cert. denied* 429 U.S. 1121 (1977); *Israel v. Morton,* 549 F.2d 128 (1977) (per Merrill and Kennedy with District Judge Enright).

currently benefitting from project water. Their interest is thus the same as respondent Yellen, respondent Miranda, a farm labor contractor, and the 121 farmworkers who have preserved and pursued this action to enforce § 46 of the Omnibus Adjustment Act of 1926 through § 14 of the Boulder Canyon Project Act of 1928.

Professor Paul S. Taylor has aptly characterized the crux of *amici's* interest in this case:

> Federal reclamation began as a program to help "farm boys" who "want farms of their own" obtain them "without being driven into the already overcrowded cities to seek employment."[3] Begun as a turn-of-the-century "war on poverty," reclamation is administered currently on important projects in apparent forgetfulness of the purpose [footnote omitted] On these projects it has become a program largely to subsidize reclamation of great landholdings primarily for the benefit of their owners.[4]

Counsel for Duarte and Casarez serve a client community, through twelve offices located in rural California. That community is comprised of a low-income population of one and one-half million people, a large proportion of which are employed in agriculture. Their immediate economic handicap is exacerbated by the very limited prospect of breaking into the pervasive pattern of large scale agricultural landholdings.[5] One of CRLA's offices is located in El Centro in the Imperial Valley. Many CRLA clients in addition to Duarte and Casarez would like to acquire excess lands.

3. Quoting Congressman Oscar W. Underwood, of Alabama. S. Doc. No. 446, 57th Cong., 1st Sess. 21 (1902).

4. *Excess Land Law: Calculated Circumvention,* 52 CALIF. L.REV. 1978 (1964).

5. *See generally* R. C. Fellmeth, *Politics of Land* (1973) and Lon L. Fuller, *Irrigation and Tyranny,* 17 STANFORD L.REV. 1021 (1965).

Ex-president Theodore Roosevelt in 1911 explained his signing the Reclamation Act of 1902 as being motivated by a desire to preserve and continue our democratic system by guaranteeing the "freedom of opportunity" for the "have-nots" to become landed.[6]

The statutorily-mandated opportunity to acquire excess lands will remain unfulfilled in the Imperial Valley unless the Ninth Circuit decision in favor of respondents is upheld. Thus on behalf of Pedro Duarte and Antonia Casarez, who like respondents are at present "have-nots," CRLA files this brief.

Amicus CALIFORNIA AGRARIAN ACTION PROJECT, INC., is a non-profit corporation organized under the laws of California, *inter alia,* to aid small-scale, family farmers; to promote organization of farmers' markets (wherein farmers sell their products directly to consumers) and consumer cooperatives; and to provide relief to the poor, distressed and disadvantaged people of rural California. The members of the project include small family farmers, taxpayers, and other rural persons who are vitally interested in the outcome of this action in that their lives and their economic and personal well-being are and have been directly affected by the resistance to the law of petitioners herein. The Project joins as *amicus* on behalf of its members.

Amicus Mexican American Political Association (MAPA) is a non-profit, non-partisan, volunteer, grassroots political organization dedicated to the advocacy of Hispanic issues.

MAPA was founded in Fresno, California in 1960 and for twenty years has played a seminal role. Among mat-

6. 7 *Transactions of the Commonwealth Club* 108 (1912-13).

ters of concern to MAPA has been reapportionment, voter registration, and the pervasive low-economic status of many Hispanics. Presently MAPA has thirty-five chapters in California and a total statewide membership of approximately 5000 individuals. In July, 1979, the MAPA general assembly voted to expand its scope nationwide and organizing drives are currently underway in several other states.

One of MAPA's chapters is in the Imperial Valley and prominent among their concerns has been the concentration of agricultural landholdings in violation of federal reclamation law.

MAPA has long employed the courts as well as other forums to advance the interests of its members and the Hispanic population at large. Thus joining as *amicus* in this brief is consistent both with MAPA's practices and principles.

Amicus Consumer Federation of America (CFA) is the nation's largest consumer membership organization, composed of more than 200 national, state, and local groups who have joined together to advance the consumer viewpoint. That membership includes grassroots consumer organizations, senior citizens, rural, labor, cooperative, and similar groups.

CFA has often appeared before this Court to advance the interest of consumers.The decision on standing by the Ninth Circuit represents, in the view of CFA, a proper holding for access to the federal courts, especially on an issue of such complexity and social impact. It is one of the principles of CFA to support the family-sized farm in American society. It seems plain that the intent of the reclamation law is to provide for that reality in the Imperial Valley of California which as a result is one of the prime agricultural areas in America. Moreover, such a change in the scale of

agriculture there, may reasonably be expected to have market place dividends for consumers in food quality, price, and choice.

Amicus Access to Justice Project of the National Legal Aid and Defender Association (NLADA) joins respondents in asserting their standing (Part IV, section A of this brief) to intervene and prosecute this action. The NLADA is a private non-profit organization whose primary purpose is to assist in providing effective legal services to persons unable to retain counsel. Its members include the great majority of legal services agencies and public defender offices throughout the United States. NLADA also includes 2000 individual members most of whom are private practitioners. The Access to Justice Project within NLADA was created to work on behalf of the clients of NLADA's members toward insuring that all people will have equal and meaningful access to the federal courts. The Project is particularly concerned that the courts reach the merits of significant statutory questions such as are raised in the case at bar. It believes that the respondents present a clear "case or controversy" as is required by Article III and that the decision of the Ninth Circuit should be affirmed.

Amicus Mexican-American Legal Defense and Education Fund, Inc. (MALDEF) was founded in 1968 as a non-profit corporation under the laws of the State of Texas and is headquartered in San Francisco, California. Its principal purpose is to secure the civil rights of persons of Mexican descent through litigation and education.

In its efforts to assist the Mexican-American community to achieve its rights under the law, MALDEF has been involved in litigation which has challenged the traditional barriers facing Mexican-Americans: abridgment of participatory, constitutional, and political rights; unequal educational opportunity; discriminatory employment practices;

unequal distribution of public services; and law enforcement misconduct.

MALDEF has extensive knowledge of the myriad ways in which the enforcement of laws continues to function to keep Mexican-Americans on the lower rung of the economic ladder.

Thus, MALDEF has an interest in the case at bench which not only centers on the enforcement of federal law but relates to the interests of a sizable portion of Mexican-Americans who make up the residents of the Imperial Valley. The failure to enforce federal reclamation law has had, and continues to have a negative impact upon the economic, social and political interests of this large Hispanic community. In many ways this impact has contributed to their alienation from the dominant society of the Valley. This failure to enforce the law not only amounts to a repudiation of the importance of Mexican-American ownership of property, but also undermines the concept of the public interest as it relates to compliance with federal law.

Over the years, the landless class in the Imperial Valley has primarily been comprised of Mexican-Americans. Because of the broad policy implications in this proceeding, the court's action may well signal the attention of Mexican-Americans for the opportunity to acquire land for farming and other economic endeavors.

Even more significant, judicial recognition that access to land in the Imperial Valley can be attained by Mexican-Americans will encourage the Hispanic community throughout the Southwest to elsewhere study and protest the lax enforcement of the law as respondents have done in the Imperial Valley. For these reasons, MALDEF joins in this brief.

Amicus Public Advocates, established in 1971, is a nonprofit public interest law firm incorporated in California and based in San Francisco. It provides ongoing legal counsel to more than seventy client groups including Black, Chicano, and Filipino associations; handicapped, senior citizen, prisoner, consumer, and womens' organizations.

As an active agent in the interest of consumers, Public Advocates has sought improved food safety, quality, and distribution in California. They have been brought to recognize, through their consumer as well as other clients, the skewed land ownership patterns in California's agricultural areas, especially the Imperial Valley. Additionally the economic and equitable rationale for family-sized agriculture has become clear. Also clear is the need for greater economic self-determination for these historically underrepresented groups. This case promises enhanced opportunities for at least some of their clients, particularly the growing Hispanic population of California. Consequently, toward these ends, Public Advocates joins in this brief.

Amicus United Farm Workers of America, AFL-CIO (UFW) is an unincorporated association chartered by the American Federation of Labor—Congress of Industrial Organizations in 1973. The UFW's purpose is to unite all farm workers under the union's emblem; to negotiate contracts to improve the wages, hours, and working conditions of farm workers; to safeguard the right of farm workers to strike or boycott; to engage in political activity which will advance the welfare of farm workers; and to guarantee to every farm worker the dignity and freedom which are the right of every human being.

Many members of the UFW, residents of the Imperial Valley who now work but do not own the land, would benefit directly from enforcement in this case of the acreage

limitation provisions of the reclamation laws. They could and would become owners of lands within the Imperial Irrigation District when excess lands now in the hands of large farm operators became available.

A large portion of the UFW membership, especially in the Imperial Valley which borders on Mexico, is of Mexican-American heritage. Economic opportunity for these citizens of the Valley depends on the rich agricultural production of its land. That production, in turn, would be impossible without the Colorado River water brought to the Valley through the All-American Canal. Those who own land, rather than simply work the land as employees for others, stand to gain the most economically from present nonenforcement. Few of the large Mexican-American population, including members of the UFW, have found opportunities to make the transition from tillers of the soil to owners, largely because land has become concentrated in the hands of a few. It is with the hope of ending this monopoly of the soil by breaking up large holdings, to give its members the chance to become small farmers, that the UFW joins this brief.

STATEMENT OF THE CASE[7]

Amici adopt by reference the statement of respondents.

There is a legal aphorism of great vintage in our Anglo-American legal system. Despite its deep historical roots, it

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7. The three petitioners in this cause—the Bryant class of excess landowners, the State of California, and the Imperial Irrigation District—will be referred to jointly unless otherwise specified. Additionally, the abbreviation conventions of *amici* will be: "CR" for the Clerk's Record; "Tr." for the trial transcript; "L.Br." for the Brief of the Landowner Petitioners; "L.App." for the Landowners' Appendix; "S.Br." for the Brief of the State of California; "Dist.Br." for the Brief of the Petitioner Imperial Irrigation District; "Dist.App." for the District's Appendix; "Con.App." for the Consolidated Appendix; "LX—" for the landowners' trial exhibits; "Pl.Ex." for the government's trial exhibits.

is of remarkable simplicity—no case holding is any broader than the narrowest reading of its facts. Recognizing that their decisions may have far-reaching and unintended consequences, our American appellate courts have long paid heed to this principle.

The factual background of these three consolidated petitions is of profound complexity. Respondents' statement of the case cannot be studied too closely by this Court. The landowner and District briefs elide too many factual linchpins.

Professor Christopher Stone has recently decried the law's limitations in solving many pressing societal problems: "In many cases lawmaking is an unsatisfactory way to deal with social problems not because of a lack of 'facts' . . . but because we, as a society, lack consensus as to the values we want to advance."[8]

But that is not the case at bar. Herein the values of family-sized agriculture are deeply and firmly rooted in a long chain of statutory enactments. They leave no doubt as to the values which Thomas Jefferson, among others, instilled. Neither can there be serious doubt about their currency and vitality in American agriculture.

But from those given premises, what most forcefully argues for affirmance of the Ninth Circuit's decision is the factual predicate of improper and immense governmental largess to excess landowners in the Imperial Valley, at the expense of those who are the Congressionally-intended beneficiaries of the mandate for family-sized farms.

SUMMARY OF ARGUMENT

I. The Family-Sized Farm Objects of Congress.

From the earliest days of the Union, our founding fathers and national legislators have demonstrated their preference for a land policy for our immense resources which would

8. *Where The Law Ends* 97 (1976).

favor family-sized farms, opportunities for the influx of immigrants who would live and work on their own land. Through numerous legislative acts, Congress has woven a fabric of interconnected farm and land policy, of which the reclamation acts for the West are a crucial thread. Cumulatively these congressional acts form a legal and historical context within which this Court must view enforcement of § 46 of the Omnibus Adjustment Act of 1926 and the Boulder Canyon Project Act.

The acreage limitation is the major tenet of the family-sized farm principle. Such egalitarian farming opportunities have been made possible through federally financed projects such as the Hoover Dam and the All-American Canal bringing water to the Imperial Valley. The test of changing times—economic as well as political—and the persistent, expanding investment in family-sized farming opportunities by the federal government is a record of commitment to a fundamental social value. It reflects a recognition that wealth (including land and water) concentration in the hands of producers is economically inefficient as well as socially inequitable.

II. Application of the Pervasive Continuity of Legislative Purpose.

Petitioner landowners are not the family-sized farmers whom consistent, congressional legislation has sought to nurture as a national social value. Rather, the trial record and the government's official statistics on Imperial Valley agriculture show that these petitioners are unusually large landowners.

Landowner petitioners may not claim a right to subsidized water on the theory of "present perfected rights" or under California law. Only the District's rights as trustee for the owners—not the landholders as individuals—need

be satisfied under § 6 of the Project Act and Article VIII of the 1922 Colorado River Compact. If a "taking" occurs, the landowners' remedy is elsewhere than in this action.

Landowners mistakenly focus on bits and snatches of the legislative history of the Boulder Canyon Project Act to assert that § 14, as it was finally enacted, excludes enforcement of the acreage limitation on lands in the District. This Court should instead, mindful of the pervasive legislative context set out here, uphold the acreage limitation.

III. Enforcement will cause neither chaos nor inequity.

Indeed, it will foster the type of prosperity originally intended by Congress i.e. prosperity of opportunity for the family-sized farmer. Without the federally subsidized water brought to the Imperial Valley by constructing the Boulder Canyon Project, residents of the valley—to say nothing of the large owners directly benefitting—would not have flourished. It is not improper that Congress should require that their prosperity, gained through expenditure of millions of taxpayers' dollars, be eventually shared. The acreage limitation will break up the monopoly excess landowners now have and finally create opportunities for family-sized farm prosperity.

IV. Petitioners' Procedural Pleas Are Without Merit

A. RESPONDENTS HAVE STANDING TO ENFORCE § 46

As direct beneficiaries of the acreage limitation principle of reclamation law, respondents are injured by the District's failure to deny water to excess landholders who refuse to enter into recordable contracts. As residents of the Imperial Valley, recent Department of Interior regulations propose to give them priority as beneficiaries of § 46 implementation. The "ex-contract" sales prices of excess lands would bring them within the economic reach of respondents and those lands are clearly identifiable. To satisfy Constitutional as well as prudential requisites for standing, respondents need not demonstrate that particular properties on specific terms are being denied them. Rather, as here, they must and do show that giving effect to § 46 is the *sine qua non* to their claims. *Warth v. Seldin* and *Simon v. Eastern Kentucky Welfare Rights Organization* are inapposite as there essential parties were not present and subject matter properties were not identified.

B. COLLATERAL ESTOPPEL DOES NOT PRECLUDE RESPONDENTS

The procedural barrier, if any, is collateral estoppel not *res judicata*. The *Hewes* superior court determination was against matters raised by Malan in his answer. The acreage limitation issue of the case at bar was outside the issues framed in the *Hewes in rem* confirmation complaint. Respondents, of course, are barred and do not seek to challenge the validity All-American Canal contract tested in *Hewes*. But as non-privies, non-class-related parties to Malan, respondents are not precluded (as Malan and his successors are) from now seeking enforcement of § 46. Moreover, exceptions to the application of collateral estoppel are present. It would defeat the ends of justice to preclude respondents as they have never had a fair opportunity to litigate the incorporation of the acreage limitation in the Project Act. The changes in law since the Wilbur letter and confirmation adjudication are several and significant. Deeply-rooted national policies for family-sized farms would be upset by non-enforcement. Current conceptions of due process teach that notice to "all persons" given in *Hewes* would be inadequate today. These special circumstances dictate an exception.

V. Equitable Estoppel.

Petitioners' plea for "fairness" based upon their detrimental reliance on the erroneous advice of the government is a claim founded upon the concept of equitable estoppel. The decisions of this Court, however, have rejected the application of estoppel which would operate to thwart important public policies. Even under the estoppel doctrine adopted by several of the U.S. Courts of Appeal, which utilize a balancing test, the importance of policies underlying the acreage limitation strongly militates against an estoppel.

ARGUMENT

I. The Family-Sized Farm Objects of Congress

Amici find the statutory construction and legislative history arguments of petitioners are unpersuasive as did the U.S. Court of Appeals for the Ninth Circuit. The panel there patiently explained how

> Congress has exempted some projects from the operation of these [Reclamation law] provisions, but "the Congress has always made such exemption by express enactment." *Ivanhoe Irrigation District v. McCracken* 357 U.S. 275, 292, 78 S.Ct. 1174, 1184, 2 L.Ed. 1313 (1958). *U.S. v. Imperial Irrigation District* 559 F.2d 509, 527 (9th Cir. 1977).

Turning to the legislative history, after careful review they then held:

> Evaluation of this legislative history does not lead us to conclude that Congress intended to exempt lands receiving water carried by the All-American Canal from the acreage limitations of Section 46. On the contrary, the legilsative [sic] history indicates that the problem did not receive the extended Congressional consideration that would be normally thought appropriate if an exemption to an important part of the reclamation law was being created. Furthermore, the legislative history can be interpreted as giving a positive indication that Congress intended that acreage limitation provisions be incorporated by the general references to reclamation law that were included in the bill sent to the House during the 69th Congress after witnesses at the committee hearings claimed that, as originally drafted, there were no such provisions in the bill. During the 69th and 70th Congresses, the House passed a bill with a specific acreage limitation provision. During the 70th Congress, the Senate was told through a committee report and by the sponsor of the legislation that its bill was substantially the same as the bill passed by the House. There was no objection in the House when it considered the Senate bill with its general incorporation of reclamation law rather than the specific language previously used in the House version of the legislation. All this points to an interpretation opposite to that urged by the landowners. 559 F.2d at 535.

The correctness of these conclusions may be seen all the more clearly in the context of the several but concomitant Congressional endeavors to foster family-sized farms. Beginning with Thomas Jefferson's advocacy of "easy access to the land, small units, and a nation of farmers who personally worked their own lands"[9] through the Food and Agriculture Act of ("Farm Bill") 1977, *Amici* present and urge upon this Court a perspective of statutory interpretation that takes into account the extended and interconnected history of farm and land policy legislation of

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9. M. R. Benedict, *Farm Policies of the United States*, 1790-1950, *A Study of Their Origins and Development* 5 (1953). See also Paul S. Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477, 512 (1955).

which the reclamation acts are but a piece.[10] Professor Sands explains this approach as being "more inclusive than the literal inquiry of *in para materia* . . . [probing] basic [legislative] policy and the pattern and development of the means and procedures used to activate that policy." Of course, the more traditional principal of *in para materia* also applies to the several reclamation acts themselves.

This broad approach to statutory interpretation was likewise utilized by the late Mr. Justice Harlan as an analytical tool in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 392 (1971). He explained:

> The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect. In many cases the scope of a statute may reflect nothing more than the dimensions of the particular problem that came to the attention of the legislature, inviting the conclusion that the legislative policy is equally applicable to other situations in which the mischief is identical. This conclusion is reinforced where there exists not one enactment but a course of legislation dealing with a series of situations. . . .

Professors Paul W. Gates, Paul S. Taylor, and Murray R. Benedict have demonstrated the necessity for this approach in their thorough historical studies of American land and agricultural policies. Professor Gates explains:

> The framers of the Newlands Act [the Reclamation Act of 1902] thought of it as a continuation of a long line of measures, all devised to bring about the establishment on the public lands of sturdy yeomanry, no matter how hard the struggle of farm making on the

10. C.D. Sands, 2A *Sutherland Statutory Construction* § 45.10 (4th ed. 1973). See also §§ 51.03 and 53.03.

> frontier. By denying water to owners of excess land within projects it was expected that all such owners would be compelled to sell their surplus holdings, presumably at prices not too difficult for homesteaders to pay. The framers of the Newlands Act were especially anxious to convey the impression that it was in the tradition and a continuation of the Homestead Act which had aided 600,000 people to acquire farms in the more humid regions of the West.[11]

Even earlier Professor Taylor had emphasized the significance of a 1903 address of President Theodore Roosevelt to the students of Stanford University:

> After noting that the early land laws had been "twisted into an improper use, so that . . . they tend to create a class of men who . . . obtain large tracts of soil for speculative purposes, or to rent out to others," he charged the students to take leadership in "securing the right use of waters, and of seeing to it that our land policy is not twisted from its original purpose, but is perpetuated . . . to turn the public domain into farms each to be the property of the man who actually tills it and makes his home on it."[12]

The tenor of this larger context is echoed even in the floor arguments of Representative Francis C. Newlands as he shepherded the original Reclamation Act through the House.

> We have not felt in this country the evils of land monopoly. Lord Macaulay said we never would experience the test of our institutions until our public domain was exhausted and an increased population engaged in a contest for the ownership of land. That

11. *History of Public Land Law Development* 656 (1968).

12. *The Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477, 479 (1955).

> will be the test of the future, and the very purpose of this bill is to guard against land monopoly and to hold this land in small tracts for the people of the entire country, to give to each man only the amount of land that will be necessary for the support of a family . . . . Convey this land to private corporations and doubtless this work would be done, but we would have fastened upon this country all the evils of land monopoly which produced the great French revolution, which caused the revolt against church monopoly in South America, and which in recent times has caused the outbreak of Filipinos against Spanish authority. 35 *Cong. Rec.* 6734 (1902).

In the sections that follow *amici* demonstrate an unmistakeable continuity of legislative purpose to the earliest deliberations of the Confederation, actions of early Congresses, the Land Law of 1820, the Homestead Act of 1862, the agricultural science network created by the land grant college acts, the Reclamation acts, and contemporary agricultural legislation.

The American land laws of the first half of the nineteenth century sought the distribution of the public domain in a family-sized farm pattern. As price speculation occurred and land monopoly abuses spread, various regulating devices were ventured by Congress (e.g., the Preemption Act of 1830 *infra* section A). By mid-century it had become clear that a wholesale revision was needed and in 1862 that was undertaken in the Homestead Act (*infra* Section B). To yet further bolster that legislative endeavor, Congress also during that year created a cabinet-level Department of Agriculture and laid the foundation for a nationwide network of land grant institutions to act as agricultural science resources to further foster and maintain this family-sized farm principle (*infra* Section D). That

support complex was added to subsequently and the imperative of fostering and preserving the family-sized farm was addressed with increasing clarity (e.g., the Smith-Lever Act *infra* Section F). By late century the domain of lands remaining for development was primarily west of the one-hundredth meridian. Here water was (and is today) an essential predicate for viable agriculture. Thus the federal scheme had to expand yet again in the form of the reclamation acts. As was the experience with the initial land distribution acts, abuses followed the first legislative action of 1902 leading to tightening amendments, especially in 1926 (*infra* Section G). Finally, as recently as 1977, Congress reaffirmed this family-sized farm keystone in contemporary American agricultural policy (*infra* Section H).

A. THE JEFFERSONIAN IDEAL

> [S]tudy . . . reveals agriculture as one of the main supports of American democracy because it is an occupation embracing millions of freemen who own property and cultivate land on a somewhat equal basis. . . . [T]he family-sized farm is the American ideal and means in effect that the owner and his son or sons can perform the actual work of tillage. . . . Hired men are rather the exception than the rule in this typical agriculture. So far as they are employed, it is usually with the instinctive purpose of raising the labor force to the normal family plane rather than in hope of abnormally expanding the business beyond the family farm norm.[13]

Previous to the Revolution, land policies had developed from several different premises. Generally the Southern Colonies typified a large scale plantation system whereas

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13. J. Schafer, *The Social History of American Agriculture* 289-90 (1936).

in New England a more egalitarian and rigorous plan of settlement flourished. With the coming of the Confederation a uniform policy was needed for western lands ceded to the common good.[14]

Thomas Jefferson and Alexander Hamilton figured early and with prominence in this initial period of debate over land policies. During his tour as minister to Paris, Jefferson pondered over the ideas he had earlier expressed to Pendleton.[15] The opportunity to tour the French countryside prompted him to return to the theme of small scale agriculture in a letter to the Reverend James Madison.[16] From Fountainbleu, he wrote:

> Whenever there are in any country uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labor and live on. If for the encouragement of industry we allow it to be appropriated, we must take care that other employment be provided to those excluded from the appropriation. If we do not, the fundamental right to labor the earth returns to the unemployed. It is too soon yet in our country to say that every man who cannot find employment, but who can find uncultivated land, shall be at liberty to cultivate it, paying moderate rent. But it is not too soon to provide by every possible means that as few as possible shall be

14. Gates, *supra,* chap. IV "Land Ordinances of 1785," 59-74; Benedict, *supra,* chap. I "Formation of American Land Policy, 1785-1900," 5-12.

15. The first occasion when Jefferson expressed these sentiments in writing would seem to be his letter to Edmund Pendleton of August 13, 1776. Boyd, 1 *The Papers of Thomas Jefferson* 492 [1950].

16. Not to be confused with his statesman cousin, Bishop Madison was the President of Jefferson's alma mater, William and Mary College.

> without a little portion of land. The small landholders are the most precious part of a state. . . .[17]

In contrast were Hamilton and

> [H]is followers, in search of funds for an empty treasury, [who] wanted to sell the lands to the best financial advantage of the federal government. This meant restricting entry to less than the amounts of land desired by settlers, in order that scarcity might create higher values. They were not much concerned with the form of the social structure that would result. It was purely a business matter. If sale in large units to speculative subdividers, or to those who might eventually create manorial estates, would yield more revenue to the treasury, there was no prejudice against this.[18]

Jefferson was involved with two Confederation committees and the resulting Ordinance of 1785 was largely a victory for the New England scheme, land at one dollar per acre, but extremely limited credit arrangements.[19] Thus the struggle over land policies was hardly finished as the Washington Administration took office in late April, 1789 and Jefferson and Hamilton faced off as Secretaries of State and Treasury, respectively.

> The young nation was desperately poor. Its credit was almost nil. Its ability to levy taxes for its support had not yet been demonstrated. By far the largest asset under its direct control was the huge public domain larger even then than the entire settled area of the original thirteen states. It would be inconceiv-

17. A. Koch and W. Peden (ed.), *The Life and Selected Writings of Thomas Jefferson* 390 (1944).

18. Benedict *supra,* at 5.

19. Gates, *supra,* 62-65; Benedict, *supra,* 11.

able that such an asset would not immediately command the interest of a hard-pressed Secretary of the Treasury seeking to establish the nation's credit and make good on its bonds; hence the early clash of opinions about how these lands should be transferred into private ownership and settled.[20]

The first product of that ideological collision was the Land Act of 1796[21] and it resulted in only an increase in minimum price to two dollars per acre and again minimal credit opportunities.[22] This latter constraint on countless farm families who ventured into the Northwest Territory, mastered the land, but struggled over the federal government's credit terms led to twelve Congressional acts for credit relief between 1809 and 1820.[23]

> Thus over a period of twenty years there emerged the main outlines of a plan for transferring lands from the public domain into the hands of farmers that has had much to do with the agricultural pattern of the North Central and some of the Lower Mississippi Valley states, including the bulk of the great general farming area of the United States. . . .The farms developed under this plan are predominantly family farms on which the labor is performed mainly by the farmer and his family.
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> . . . .
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> Though the pioneering farmers had thus achieved some of the ends they sought, they were by no means

20. Benedict, *supra*, 4.

21. Act of May 18, 1796, 1 Stat. 494.

22. Gates, *supra*, 125-126; Benedict, *supra*, 13.

23. Benedict, *supra*, at 17; Benedict comments "Thus was established a pattern of action which has continued into recent times in the handling of similar problems in many of the federal irrigation projects—a practice which lends itself to unwarranted efforts to exploit the government, as well as to demands based on genuine need for relief."

> satisfied. The troubles of the national government in disposing of its lands were not at an end.[24]

Further reforms were attempted under the Land Law of April 24, 1820, 3 Stat. 566.

> Though it did not grant pre-emptions and donations to settlers as desired by the western pioneers, it marked a step forward in the establishment of policy. It was made applicable to all public lands of the United States, thus providing a uniform method for disposing of them regardless of location. They were to be sold at public auction in half and quarter sections. Private sale also was permitted. Some pre-emption rights were recognized for settlers who paid in part for their lands and gave up part. At private sale, purchasers might buy as much as a section, or as little as eighty acres. The minimum price was set at $1.25 per acre. No credit was allowed. Hence this act marked a reversion to straight cash sales.[25]

Professor Gates elaborates upon this "preemption" problem:

> Preemption, the preferential right of a settler on public lands to buy his claim at a modest price, had been generally conceded . . . to persons on the outer edge of the frontier by the time of the American Revolution. This privilege had not always been won easily, and only by vigorously resisting ejectment and fiercely demanding the right to acquire the land for a small payment or fee, in preference to all others, had the settlers been victorious. If, unluckily, they found themselves on absentee-owned land and ejectment proceedings were brought against them, they insisted on payment for the value of all improvements they had made.[26]

24. Benedict, *supra*, at 16.

25. Benedict, *supra*, at 17.

26. Gates, *supra*, at 219. *See generally* his chapter X, "Preemption," 219-47.

A general preemption measure was enacted in 1830. 4 Stat. 420. But it was only for a year's duration and was retroactive only for settlers who had been in possession and cultivated during 1829. They were limited to making "entry" on no more than 160 acres.

Reports of speculation and demands for reform continued notwithstanding.

> By the early forties criticism of the growing "monopoly" of the public lands was being expressed by George Henry Evans and his associates in the National Land Reform Association. Evans declared that every man had a natural right to a portion of the earth for his maintenance, that the public lands belonged to the people, and that title should be based on use, not purchase. He wanted land sales to be made to actual settlers only and to be limited to small unalienable properties. Such a policy would help to rid the cities of their unemployed and thus better the lot of those who remained.[27]

B. THE HOMESTEAD ACT

Professor Taylor has ably summarized this era of shaping the rural society of the nation in an article published while this case was pending in the Ninth Circuit.

> In years preceding the Civil War, national land policy was under recurrent congressional debate. The nation's frontier was moving westward, and an underlying issue was whether national land policy should favor expansion of the New England family farm pattern or the southern plantation-slave-labor system. The family farm pattern won out when Congress passed and President Abraham Lincoln signed the Homestead Act in 1862. [Ch. 75, 12 Stat. 392, 43 U.S.C. § 161 (1964)] The new law was designed to favor the

27. Gates, *supra*, at 170-71.

> actual settler on the land, and was passed after southern representatives had left Washington with the outbreak of war. Historian Benjamin H. Hibbard has described the Homestead policy:
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> "Settlers finally could acquire farms of 160 acres free of all charges, except a minor fee to be paid when filing the claim. To insure permanency of settlement the law specified that before title to the land was gained the individual must live on the homestead for five years." [*A History of the Public Land Policies* 385 (1924)]

Although the intent to insure permanency was clear, the device to achieve it was inadequate. Pointing to the critical weakness, Hibbard notes that the public policy controls ended once title had passed from the government to a landowner:

> "With the feeling that all land should be made private property as rapidly as possible . . . that laissez faire is the best policy. A land policy means social control over one of the greatest instruments of production. . . .
>
> . . . .
>
> "That the land issue is not settled once for all by and through private ownership is demonstrated in the history of most countries of which we have knowledge, and conspicuously in the struggles going on around us to-day [1924]. Not only do Russia and Mexico furnish evidence of the persistence of the land problem long after land has once been put into private hands, but countries much more stable exhibit tendencies almost as pronounced and not greatly different in character. For example, within a quarter century there has been a virtual revolution in the land system of Ireland, supervised and financed through government . . . in Denmark . . . in New Zealand . . . Australia . . . ." [Ibid. 562-563.]

> As the nation's agricultural frontier moved westward across the hundredth meridian, the insufficiency and undependability of rainfall began to impede successful homesteading by family farmers under the terms of the Homestead Law.[28]

The Congress therefore passed a succession of further measures designed to foster and support family-sized farms.

C. THE DESERT LAND ACT

There were several settlement measures subsequent to the original Homestead Act which opened lands in the West not subject to preemption and the Desert Land Act[29] of 1877 in particular was the basis for the initial private acquisition of much of the irrigated lands of the Imperial Valley.[30]

Professor Gates explains its provisions:

> [U]pon filing of the application a payment of 25 cents per acre was to be required, three years to be allowed for the completion of the improvements at the expiration of which time the balance of $1 an acre would be due. . . . [I]ndividuals could make only one entry and the 640 acres selected were to be in reasonably compact form.[31]

D. THE MORRILL ACT

The Morrill Act of 1862 provided for the original grant of land to the various states for the endowment, support

28. Taylor, *Public Policy and the Shaping of Rural Society*, 20 SOUTH DAKOTA L.REV. 475, 480-481 (1975).

29. Ch. 107, 19 Stat. 377, 43 U.S.C. §§ 321, *et seq.*

30. T. H. Watkins, *California: An Illustrated History* 308-310 (1978); D.Br. 10, ftn. 10.

31. P. Gates, *History of Public Land Law Development* at 638. Mr. Justice Rehnquist recently reviewed the background of this Act in *California v. United States*, 438 U.S. 645, 657-58 (1978) so *amici* do not tarry on the subject.

and maintenance of agriculture and mechanical arts. Ch. 130, 12 Stat. 503, 7 U.S.C. §§ 301-305, 307, and 308. The Act granted to the states public lands equal to 30,000 acres for each Senator and Representative in Congress. Discussion in support of the Act shows in no uncertain terms that its intent was to foster a way of agricultural life that would help—not eliminate—small farmers. The Act's legislative history demonstrates that it was enacted in response to a recognized need to make higher education available to persons other than the privileged few, and thereby to develop "the minds of the masses," "the mind of the laborer," and the "intellect of the man who labors and sweats for his own bread." *Cong. Globe* 720, 35th Cong., 2d Sess. (1859). The legislation was intended to benefit the "rural population" as a whole and the endowment was provided in the nature of a trust for that purpose. *Id.*, 719, 720, 724.[32]

When the Morrill Act of 1862 was first introduced into Congress, its author, Congressman Morrill, concluded that: "The prosperity and happiness of a large and populous nation depend: 1) Upon the division of the land into parcels. 2) Upon the education of the proprietors of the soil." *Cong. Globe* 1692, 35th 1st Sess. (1858). Congressman Morrill also emphasized the following conditions in justification for the Act: the wide-spread deterioration of the soil; the specific need to test soils and crops; the need and desire for scientific knowledge by individual farmers; the absence of schools for practical education; the need to act to benefit the working classes; and "to do something for agriculture worthy of its national importance." *Id.*, 1693-95, 1697.

32. In 1890, a "second Morrill Act" passed, providing for further endowment to the Agricultural Colleges and expressly creating separate colleges for Negro students. Ch. 841, 26 Stat. 417, 7 U.S.C. §§ 321-326, 328 (1964).

E. THE HATCH (OR AGRICULTURAL EXPERIMENTAL STATION) ACT

The Act (Ch. 314, 24 Stat. 509) was intended to insure that people in need of agricultural education and information would receive it, and that the money would not be diverted for other purposes not intended by Congress.[33] To this end, it established agricultural experiment stations to do research and work in addition to the Colleges, "to give practical direction to agencies which Congress has already created" and "to increase the efficiency of these Colleges in their relation to agriculture exclusively." H.R. Rep. No. 848 49th Cong., 1st Sess. 8 (1886).

This theme, to provide assistance to the farmer on the land who was otherwise powerless and in serious need of government assistance and support (in contrast to land speculators, trusts, and monopolists), continues to the present day. Thus, when the Hatch Act of 1887 was enacted adding the experiment stations to the land grant complex (and in part in response to the fact that then existing agricultural colleges were providing little benefit to individual farmers), the principal purposes of the land grant complex was nonetheless reaffirmed.

> In our zeal to look after the manufacturing interests of the country we have overlooked in a very large measure *the men who are without power to combine,* who are without the power of association and the consequent power to influence public opinion. 17 Cong. Rec. 725, 49th Cong., 2d Sess. (1887) (Emphasis added).[34]

33. There existed concern in Congress that several states had diverted the Morrill Act endowment for unintended purposes, particularly education in non-agricultural subjects, and were providing little benefit to individual farmers. *See, e.g.,* 17 *Cong. Rec.* 6678, 49th Cong., 1st Sess. (1886); 17 *Cong. Rec.* 1041, 1043, 1077, and 1083, 49th Cong., 2d Sess. (1887).

While the Hatch and Morrill Acts provided specific means of developing agriculture information needed by the individual farmer, they did not provide a method of communicating the information to the people on the land.

F. THE SMITH-LEVER ACT

The final component of the land grant complex resulted from the enactment of the Smith-Lever Act of 1914, Ch. 79, 38 Stat. 372, 7 U.S.C. §§ 341 *et seq.*[35] By adoption of this Act, the third element of the land grant complex was added —the Cooperative Extension Service. The Act authorized federal appropriations to take the teachings of the agricultural colleges and research of the experiment stations directly into the rural areas, for the benefit of rural people. In actuality, most land grant colleges had been engaging in such "extension" activities for several decades. Smith-Lever merely recognized this reality and appropriated additional

34. During the public discourse leading towards passage of the Hatch Act, advocates of the legislation were quite clear on this point: "the farmer's work is not big business, they argued, and he needs the assistance of the government where business and commerce do not." Eddy, *Colleges for Our Land and Time* 96 (1956).

35. The legislative history of the Smith-Lever Act is far more extensive than that of the Morrill or Hatch Acts since there was an extensive debate over the fundamental purposes of the whole scheme of the three statutes. The Smith-Lever Act was viewed as an integral part of the Hatch and Morrill Acts as the means by which to fulfill the purposes of those Acts: "The measure . . . is simply an appropriation to perfect the work of the Morrill Act and the Hatch Act . . . to carry the knowledge they have gathered . . . to the whole people engaged in agriculture. . . ." 49 *Cong. Rec.* 1956, 62nd Cong., 3rd Sess. (1912); the Senate Report stated that the "object of [the Act was] to carry to the farmers at their homes the knowledge gathered at the agricultural colleges and the experiment stations. . . ." S.Rpt. No. 139, 63rd Cong., 2d Sess. 2 (1913).

federal funds for this purpose. Consistent with the theme of its predecessor legislation, the Smith-Lever Act made it clear that it was "the little fellow" that was the intended beneficiary of the land grant complex. Its co-author, Congressman Lever, stated that:

> *The man we desire to reach is the small farmer,* the man who does not read the bulletins, the man who has no confidence in book farming, the man who does not take an agricultural paper. *We want to reach the little fellow out in the farm who needs help.* [Applause] 48 *Cong. Rec.* 10852, 62nd Cong., 2d Sess. (1912) (Emphasis added.)

By providing the means for "diffusing" the information developed by the Agriculture Colleges and Experiment Stations, Smith-Lever greatly improved the statutory scheme and defined the specific purposes of the land grant college complex.[36]

Once again, the common theme exists that the small farmer was intended to be a primary beneficiary—not a victim—of the work done. According to its author, Congressman Lever, when the bill was first introduced, said its purpose was "to disseminate through the agricultural colleges to the people themselves on the farm the information that we have been gathering for the last half century." 48 *Cong. Rec.* 9252, 62nd Cong., 2d Sess. (1912). Lever explained that this Act was necessary to fulfill the purposes of the Morrill and Hatch Acts. *Id.,* 10851. These purposes were not to act solely at the behest of large trusts, landowners, or as Lever referred to them, "men [with] power to combine."

In Smith-Lever, the earlier goals were reaffirmed: To promote agricultural education among the masses of the

36. Owing to a dispute over the formula for appropriating funds, no bill was approved by the 62nd Congress, and the matter was acted upon during the following year, in the 63rd Congress.

population; to remedy conditions of relatively low yield per acre, low increase in the productivity of the soil, decline in farm and rural populations, decrease in per capita production and increase in farm indebtedness. *Id.,* 11636, 11637, 11707; *see also* 51 *Cong. Rec.* 1932-33, 63rd Cong., 2d Sess. (1914). Similar goals were stated by its author in the Senate, Senator Smith, in order to benefit "49,000,000 men, women and children" who occupy "the farmlands of our States, . . . [a] large number [of whom] struggle to earn a livelihood and cannot afford to experiment for the purpose of learning things that are new." 49 *Cong. Rec.* 832, 62nd Cong., 3rd Sess. (1912).

Perhaps the best indication of the principal Congressional purpose in establishing the family-sized farm support complex came during the Smith-Lever Act debate in the Senate to establish the basis on which funds would be apportioned to each state. A heated controversy existed over whether rural population or simple acreage should be used as the funding basis. If distributed on the basis of rural population, states with many small farmers would receive more than if the formula was based upon acreage since the structure of agriculture in many states consisted of a comparatively few number of farmers cultivating large plots of land.[37]

In this "land vs. people" debate, the author of the bill, Senator Smith, strongly advocated "rural population" (defined as the population in towns of 2,500 or less) as the basis for appropriation. 51 *Cong. Rec.* 1826, 63rd Cong., 2d Sess. (1914). In response, Senator Cummins of Iowa, the principal spokesman for the acreage basis stated:

37. Fifty years before, in enacting the Morrill Act, the identical issue arose. Senator Gwin of California attempted to amend the bill to apportion the grant on the basis of acreage as well as population. The proposed amendment was rejected without debate. *Cong. Globe* 785, 35th Cong., 2d Sess. (Feb. 4, 1859).

> "Why not adopt another standard . . . namely the area of land in each State under practical cultivation? It is intended to make that land more productive. It seems to me the benefits of the bill if distributed according to the lands under cultivation in each State would be more fairly, more equitably divided. . . ." *Id.*

Senator Cummins and his supporters argued forcefully, albeit unsuccessfully, that the purpose of the land grant college complex was to increase productivity of land, not of people. They further contended that the benefits of the bill could not, or should not, be provided to all of the persons included in the rural population base (*e.g.*, farm laborers, small farmers, etc.) *Id.*, 2654. Senator Root of New York, a fervid supporter of a rural population base, disagreed forcefully. In language particularly applicable here, he stated:

> [T]he people whom we should most desire to help are the small [land] holders and not the large holders. It is the small farmer who is getting along just on the edge of poverty, with the little farm, who needs the kind of instruction and the encouragement which this bill will furnish, and not the man who has his thousand acres and who has at his command, without any help, all of the literature and all the instruction and high-priced assistance and superintendence for himself. *Id.*, 1826.[38]

Even the supporters of an acreage basis recognized that small farmers were intended to benefit from the land grant

38. It is important to point out that Smith-Lever was adopted at a time of great social, industrial and agricultural change. The "progressive movement" was at its peak and many of its individualistic, agrarian and anti-monopoly ideals and values are reflected in this legislation. *See generally, R. Hofstadter, The Age of Reform* 94-130 (1955). Of course, this is true *a fortiori* of the reclamation legislation between the initial foray of 1902 and the Omnibus Adjustment Act of 1926. See generally Taylor, ***The Excess Land Law: Execution of a Public Policy,*** 64 YALE L.J. 477, 487 (1955).

complex—not be driven out of existence by its research and development activities. Senator Cummins, in response to Senator Root's comment, acknowledged: "The observation made by the Senator from New York in one respect is true. The bill is intended partially, possibly largely, for the benefit of the small farmer. . . ." *Id.* He then urged that if the small farmer was to be the beneficiary, Congress should use "agricultural" rather than the overall "rural" population. *Id.* This view too was rejected.

Senator Cummins compared his own state of Iowa to Georgia (Senator Smith's state) and noted that while they were essentially equal in total population and total land area, Iowa had two and one-half times more acreage in improved farm land than in Georgia, more than double the value of agricultural production, and the average Iowa farm was three and one-half times larger than the average Georgia farm. A similar comparison was made for 12 other Midwestern states and 12 other Southern states. Under the rural population basis, the Southern states received 40% of the funds, compared to 36% for the Midwestern states which produced practically twice as much in agricultural crops. *Id.*, 2581-82. Senator Cummins said that in his view, the purpose of the bill was to increase production "so that prices may decline. . . ." *Id.*, 2650. Therefore, the bulk of the funds should go to those states, the Midwest, that produced the most. This position was most explicitly stated by Senator Hitchcock:

> "If there is any theory at all upon which it [the vote of an urban Senator] can be defended, it is that the effect of the [bill] . . . is to reduce the cost of living by reducing the cost of food. The Senator from Georgia [Smith] will realize that the great prairies out here that are cultivated, as he says, by machinery more

> than by men, are the very regions where the food of the cities is produced; and it is in the improvement of agricultural conditions upon those great fields that the man living in the city can hope . . . to secure a reduction in his cost of living. *Id.*, 2735.

This view was explicitly and decisively rejected by Congress.

In contrast, those supporting the legislation said, "it is human beings, and not broad acres that we are trying to educate; we are trying to improve the man; so that the man, by this superior knowledge may improve the farm, thus bringing added wealth to our country." 51 *Cong. Rec.* 2732, 63rd Cong., 2d Sess. (1914). (Remarks of Senator Brady.)[39] As Senator Smith recognized, by helping rather than hindering the small farm, the nation in its entirety would benefit:

> [T]he small farms around the big cities . . . and in the balance of the States will be increased in their capacity to furnish this food by the training to be given to the individual man, . . . which will increase the food supply and take care of the great cities, as well as the rural population. *Id.*, 2735.

A strong sentiment was expressed in support of those engaged in intensive agriculture, on small farms, rather than larger, more mechanized landowners:

> [T]he purpose of the bill is to instruct the farmer—that is, to instruct men. . . . The farming is necessarily for the local market and is intensive . . . . [T]he small farmer . . . is the very man who needs more than any other all the aid that science can furnish; and for that reason it appears to me to be fairer to base the distri-

39. This debate has its contemporary counterparts e.g. Mr. Justice Clark's discussion of the land versus people debate in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 297 (1958).

> bution of the fund on the rural population than upon the number of acres. *Id.*, 2740 (Remarks of Senator Lodge.)

Senator Cummins could only muster 16 votes for his amendment. *Id.*, 2744. The rejection of this amendment, and the surrounding debate, reflect a clear purpose and priority: to act first and primarily for the small farmer and landowner who needs (and cannot afford) the help the most.

Thus, the Smith-Lever Act completed the land grant system begun by Morrill in 1858. Congress subsequently enacted additional appropriation bills increasing the funding of land grant colleges[40], but none altered the principal beneficiaries or original purposes of the land grant college acts: to act primarily for the benefit of small farmers, the "little people" of rural America, to deter loss of rural population and migration to the cities, to benefit consumers, maintain strong viable communities, and improve the quality of rural life.

G. THE RECLAMATION ACTS

Respondents have already developed[41] with some care the immediate background of the reclamation legislation

40. E.g., the Purnell Act of 1925, ch. 308, 43 Stat. 970 which dealt, *inter alia*, with "farmer's economic problems . . . wide and varied field of home economics and the social problems of country life." 66 *Cong. Rec.* 3449, 68th Cong., 2d Sess. (1925); the Bankhead-Jones Act of 1935 and 1946, 7 U.S.C. § 427 (altering the funding formula to include a composite of rural and farm population.)

41. Respondents have excerpted substantial portions of chapter 8 ("Federal Reclamation Law") of the legal treatise *Water and Water Rights* (edited by Professor Clark, 1967). The author of chapter 8 is the noted water law expert Joseph Sax of the University of Michigan law school. Because respondents are already presenting the Sax discussion to the Court and because Professors Benedict and Taylor present historical corroboration, *amici* omit referencing the works of Professor Sax.

which preceded the Boulder Canyon Project Act of 1928. Ch. 42, 45 Stat. 1057, 43 U.S.C. §§ 617-617t, L. App. 134a-150a.

Professor Benedict traces the clearly discernible progression of law-making in support of family-sized farming from the New England plan of settlement through the land grant college acts to the reclamation legislation. (His footnotes are edited and renumbered.)

> The early land legislation which culminated in the Homestead Act of 1862 related almost wholly to land watered naturally by rainfall. When the arid regions farther west began to be taken up by farmers it soon became evident that the settlement plans designed for the humid areas were poorly suited to the lands of the Plains and Mountain states and to those of the Pacific Coast ....
>
> As this problem became more evident various laws were passed to alleviate it.[42] These did not meet the situation adequately though they afforded some relief. By an act passed in 1866 (amended in 1870) the federal government relinquished any control it might have over the waters of nonnavigable streams in the West, and acknowledged water rights established under local customs and laws.[43] This was to give rise to important policy controversies in a later period, but was a logical course when the act was passed.

42. For a fuller discussion of this problem and the laws pertaining to it, *see* E. L. Peffer, *The Closing of the Public Domain, Disposal and Reservation Policies, 1900-50,* ch. 8, "Homesteading the Arid West," (1951).

43. There had been some earlier legislation relating to classified lands, namely, the acts turning over to various states swamplands of specified types. These acts (1849, 1850 and 1860) were designed to facilitate the reclamation of lands subject to overflow. Title was transferred to the states in fee simple, with provision that proceeds from sale of the lands should be used for reclaiming them by means of levees, drains, etc. In all, more than 64 million acres of public lands were transferred to the states in this way.

> The Desert Land Act of 1877 did little to correct the situation, though a good deal of land was taken up under its provision. [footnote omitted] A more considered effort to meet the problems of the arid West took shape in the Carey Act of August 18, 1894. This was designed to meet recognized defects in the Desert Land Act and the Act of October 2, 1888. The Act of 1888 included provision for surveys by the Geological Survey to determine which lands in the arid regions could be reclaimed by means of irrigation. It also directed that lands designated as suitable for reservoirs, ditches and canals should be held as the property of the United States and not subject "to entry, settlement or occupation until further provided by law."[44]
>
> The Carey Act granted one million acres to each state containing arid lands, on condition that the state provide for the necessary reclamation. The states were to determine the procedure to be used. The usual plan

44. Much controversy arose over the interpretation of this act. "The Department of the Interior and the Acting Attorney-General interpreted the language to mean that 'entries should not be permitted therefor upon any part of the arid regions which might possibly come within the operation of the Act.'" R. Teele, *"The Economics of Land Reclamation in the United States"*, 65-66 (1927). The reaction in the West to this interpretation, which meant virtually the withdrawal from entry of all public lands in the arid regions, was so vigorous that the provision was repealed in 1890. In the congressional debates it was claimed that the act constituted a "system of national irrigation." They thus foreshadowed the controversies over reclamation policies in California which developed in the 1940's. The Department of the Interior already was laying claim to broader powers than the farmers of the West were willing to concede to it. Teele concludes (p. 66) that "Congress in providing for these surveys did not intend to establish a system of national irrigation, and that the advocates of such a system in the Department of the Interior defeated their purpose by enlarging the scope of the reservation provided for far beyond the intent of Congress. This destroyed what might have grown into a nationally controlled development of the arid lands of the West and restored or reinstated the policy of leaving unobstructed the course of private development."

was for them to contract with construction companies to reclaim specified areas and to sell "water rights" as a means of recovering their investments. The land was sold by the states at nominal prices, but only to those who had contracted for the purchase of the water rights.

The results were far from satisfactory. The construction companies sold bonds which many investors thought were in some way guaranteed by the federal and state governments. It was also widely believed that the bonds constituted a lien on the lands. Neither of these assumptions was correct, though the Congress intended that such costs should become a lien on the land. As a result of these misconceptions, bonds were more salable then they otherwise would have been, and many unsound projects were undertaken. Since the act applied only to public lands, the scope for operation under it has been continually decreasing owing to the alienation of such lands under other legislative provisions. [footnote omitted]

Professor Benedict goes on to describe the Newlands Reclamation Act of 1902:

> The time was ripe for a change of policy in respect to irrigation development. When settlement of the arid regions was first begun, small irrigation systems were developed by individual farmers who took water from streams adjoining or running through their properties. Even before that, modest developments had been made by the mission fathers in California . . . . Individual farm-irrigating systems were also common in the Black Hills of South Dakota and in the valleys of California and Colorado. Numerous water systems were also developed by the miners in California after the gold discoveries of the middle of the century, and much of the custom and law relating to water rights in California grows out of their use in mining rather than agriculture.

The amount of land that could be irrigated through these rudimentary arrangements was limited, indeed, and in no sense adequate to meet the growing demand. With the passage of enabling acts in the various states and the activities initiated under the Carey Act, group projects for the building of dams and canals and the distribution of water became common. Most of these were organized as irrigation districts with many of the powers and characteristics of minor civil divisions of government. Some were corporate ventures privately owned.

By the turn of the century most of the better irrigable areas, especially those that could be developed at modest expense, had been brought under irrigation in these various ways. There were lands that still could be irrigated, some of them very good lands, but the structures required called for huge investments suited only to government undertakings rather than to the resources of private corporations or small groups of farmers. The West was eager for settlement and development, and, with its disproportionate representation in the Senate, it was coming to have a powerful influence in legislative matters. Furthermore, the growing interest in conservation, coupled with a new if somewhat unwarranted fear that we were approaching a situation of chronic underproduction of foods, gave impetus to federal action in creating more farms. The interest of the President was easily enlisted in a project of this kind.

The result was a new law, the Reclamation Act of 1902, which marked a significant change in American land policy.[45] First, it was an attempt to set up, for

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45. This new approach to the land problems of the arid West had been implied in the work of Major John Wesley Powell, which began at a much earlier date. Powell, a veteran of the Civil War, explored the Grand Canyon of the Colorado in 1869. His reports led presently to a survey under the auspices of the Smithsonian Institution. As a result of Powell's pioneer work and the publication, in 1878, of his *Report on the Lands of the Arid Region of the United States,*

irrigable lands in the West, a policy that was specifically designed for that area. Secondly, it provided funds, without interest, for the development of such lands. Thirdly, it implied more paternalism on the part of the government than had characterized any previous land legislation. In addition, it brought up the question of government versus private production of hydroelectric power. Roosevelt had already expressed himself strongly on this latter issue by vetoing a bill which would have authorized private development of power at Muscle Shoals, Alabama. [Footnote omitted] More and more the public was coming to regard water power as an asset to be developed as a public resource rather than to be turned over to private corporations for their profit.[46]

In furtherance of that "public resource" perspective, the architects of the 1902 Act employed five devices to deter land monopoly resulting in federal water project areas. Professor Taylor has definitively described them.[47]

H. Exec. Doc. 73, 45th Cong., 2nd Sess., he became Director of the United States Geological Survey in 1880. A Public Lands Commission had been authorized in 1879, with orders to submit to the Congress, within one year, a codification of the laws relating to the survey and disposition of the public domain. It was also to provide a system and standards for classifying public lands as arable, irrigable, timber, mineral, etc., and was to include the recommendations of the Commission for disposal of the remaining part of the public domain. The voluminous and carefully prepared report, of which Powell was one of the authors, included recommendations for the classification of public lands and the repeal of the pre-emption laws and the Timber and Stone Act of 1878. See *Report of the Public Lands Commission*, H. Exec. Doc. 46, 46th Cong., 2nd sess., 1880. Both Powell's work and the report of the Commission were in advance of the thinking of the time and gave rise to considerable opposition. Powell's retirement as Director of the Geological Survey in 1894 was in part a result of antagonism to his policies though it was also due in part to ill health. His views and his contribution to knowledge about the West were, however, to be increasingly recognized as the interest in land policy grew.

46. Benedict, *supra*, 124-27.

47. *The Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477, 484-86 (1955).

First was the use of public enterprise to supplement private enterprise in irrigation development. While showing energy in completing less costly projects, private enterprise had exhibited a reluctance to undertake the larger ones. The sponsors of the bill might have suggested giving large blocks of public land to corporations, enabling them to recoup the cost of constructing irrigation works by lease or sale of the land. Congress had used that method to get railroads built, but was not prepared to repeat it to promote irrigation. The House Committee on the reclamation bill rejected the use of land grants specifically because the sacrifice of "our time-honored policy of inviting and encouraging small individual land holdings" was too "stupendous a price" for irrigation development. [H.R. Rept. No. 794, 57th Cong. 1st Sess. 3 (1902)] Instead public enterprise was to be financed by a reclamation fund consisting of revenues from the sale of public lands in the western states. [footnote omitted.] This fund was to recover project construction costs from the benefiting water users in annual installments, not exceeding ten, without interest. [§ 4, 32 Stat. 389 (1902), 43 U.S.C. § 419 (1964)] In this way the fund would revolve and provide continually for new projects.

A second measure to prevent monopolization and assure occupation of irrigated lands by actual settlers was a ban on the commutation provisions of the homestead law when applied to reclamation projects. [§ 3, 32 Stat. 388 (1902), 43 U.S.C. §§ 416, 432, 434 (1964)] The commutation privilege offered a cash alternative to the requirement of personal inhabitancy of a claim. In practice it resulted in the barter of public policy favoring actual settlers for the monopolists' ready cash. Congress, fully aware of this, forbade commutation on reclamation projects in 1902. [Footnote omitted.]

As a third step toward encouragement of settlers and discouragement of speculators and monopolists,

the sponsors of reclamation stiffened the inhabitancy requirements of the earlier homestead law. They prescribed that an entryman must be either a "bona fide resident on such land, or occupant thereof residing in the neighborhood . . ." and must reclaim for agricultural purposes at least one-half of the total irrigable area of the entry. [§ 5, 32 Stat. 389 (1902), 43 U.S.C. §§ 381, 392, 431, 439, 476 (1964)] Furthermore, their bill authorized the Secretary of the Interior to lower the maximum area per entry to the acreage "reasonably required for the support of a family . . ."[§ 8, 32 Stat. 390 (1902), 43 U.S.C. § 372 (1964)] They recognized that the traditional quarter-section granted in the humid belt was often too large for a family farm on irrigated land.

The sponsors' fourth anti-monopoly and anti-speculation provision was that water rights shall be "appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right." [§ 4, 32 Stat. 389 (1902), 43 U.S.C. § 419 (1964)] Early irrigationists had been greatly dissatisfied with dependence on others in control of their water supply, and regarded tying water and land together in common ownership as among the surest of anti-monopoly devices. [Citation omitted.]

The sponsors' fifth measure against monopoly, the one that has become most famous of all, was the "excess land" provision. It prescribed that "no right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner . . . and no such right shall permanently attach until all payments therefor are made. [§ 5, 32 Stat. 389 (1902), 43 U.S.C. §§ 381, 392, 431, 439, 476 (1964)] This law neither confiscates land nor limits the amount of land owned by any *individual* which may receive water from a federal reclamation project. The principle upon which it rests is that no individual should obtain more public water than his equitable share. It is unfortunate

> that the complexity of language required to translate this simple principle into the specifics of acre-feet of water, land and individuals owning land, invites unintentional confusion and facilitates the spread of misconceptions by special interests.

This final device guaranteeing family-sized farm has been the most publicly controversial of the Act's provisions yet it has been reaffirmed by the Congress thirteen times between 1902 and 1946[48] and all subsequent attempts have been rebuffed as well.

These measures were further improved upon by several later amendments. Most significant of these was the Omnibus Adjustment Act of 1926, specifically § 46, 44 Stat. 649, 43 U.S.C. § 423e. As recently as December 6, 1979, the Solicitor of the Department of Interior has explained this act and provision as being "intended not as a substitute for the 1902 Act, but as a means of ending certain abuses of the policies of the 1902 Act; namely, speculation and inefficient administration."[49]

It was loopholes and speculation which led[50] successively to the joint liability contract provisions of the Act of August 9, 1912,[51] the prerequisite of agreement to dispose of excess lands under Secretarial price controls under the Reclamation Extension Act of August 13, 1914,[52] the irrigation district contract authorization of the Act of May 15, 1922,[53] the Secretarial creation of and report by the famous

48. Bureau of Reclamation, *Landownership Survey of Federal Reclamation Projects,* 62 (1946).

49. Opinion of the Solicitor, Department of Interior, M-36919, —Pub. Lands Dec.— ....., (December 6, 1979), slip opinion at 29.

50. See also discussion by Solicitor Krulitz *id.,* at 27-38.

51. 37 Stat. 265, 43 U.S.C. § 541 (1970).

52. 38 Stat. 686, 43 U.S.C. § 471 *et seq.* (1970).

53. 42 Stat. 541, 43 U.S.C. § 511 *et seq.* (1970).

"Fact Finders,"[54] their Act of December 15, 1924,[55] and finally the Omnibus Adjustment Act. Thus at the time of enactment of the Boulder Canyon Project Act in 1928, the family-sized farm guarantees for beneficiaries of reclamation had been reinforced not undermined. That state of the law remains unaltered.

H. THE 1977 FARM BILL

The Morrill, Hatch, and Smith-Lever Acts established the land grant colleges to bring the benefits of learning and research to small farmers, laborers, consumers, and rural Americans. They were *not* established to subsidize and act exclusively in response to demands made by corporate interests, trusts, wealthy land holders, etc. Indeed such a purpose was advocated by some and specifically *rejected* by Congress.

In 1977 Congress enacted P.L. 95-113 (91 Stat. 913 comprehensive legislation reauthorizing all agriculture-related federal programs, including land grant colleges), which provided that, while federally funded agricultural programs need not "be administered exclusively for family farm operations," nonetheless:

> "the maintenance of the family farm system of agriculture is essential to the social well-being of the Nation and the competitive production of adequate supplies of food and fiber. Congress further believes that any significant expansion of non-family owned, large-scale corporate farming enterprises will be detrimental to the national welfare. It is . either the policy nor the intent of Congress that agricultural and agriculture-related programs be administered exclusively for family farm operations, but it is the policy and express intent of Congress that no such program be administered in a manner that will place the family farm at an unfair economic disadvantage." *Id.,* § 102, 7 U.S.C § 2266(a).

54. *Federal Reclamation by Irrigation,* S. Doc. No. 92, 68th Cong., 1st Sess. (1924).

55. Second Deficiency Act of 1924, § 4, 43 Stat. 701-04.

Section 102 was a Senate floor amendment by Senator Pearson of Kansas. In his explanatory remarks, he said that his "amendment breaks no new ground, declares no new principle." 123 Cong. Rec. S 8396, 95th Cong., 1st Sess., May 24, 1977 (daily ed.). He stated that the policy has existed "[f]rom the Revolutionary period to the present. . . ." and "was based on the conviction that for social and political reasons small scale, family farming was preferable to large scale estate farming." *Id.* He acknowledged that "[i]t is true we never sought to dismantle the large estates and plantations but we never sought to consciously promote their growth." *Id.* And, he also noted that while "we have not been altogether successful in promoting and protecting the family farm system, . . . our intent to do so has always formed the base of our agricultural policy deliberation." *Id.*

Title XIV of the 1977 Farm Bill, the National Agricultural Research, Extension and Teaching Policy Act (7 U.S.C. §§ 3101 *et seq.*) contains lengthy criticisms of land grant college and other agricultural research. In the hope of insuring that such research be in the "public" rather than "corporate" interest, Congress by this Act estabished the National Agricultural Research and Extension Users Advisory Board, made up of representatives of a wide variety of interests affected by land grant research and development activities (*e.g.,* consumers, farmers, environmental interests, labor, nutritionists, etc.). *See* 7 U.S.C. § 3123.

Section 1402(8)(J) (7 U.S.C. § 3101 (8)(J) of Title XIV states that "new Federal initiatives are needed in . . . programs oriented to the needs of small farmers and their families and the family farm system, which is a vital component of the agricultural capacity of this country." The Senate Agriculture Committee Report noted, in regard to this provision, that:

> "Research on problems and technologies specific to small farmers have [sic] been virtually unfunded. These are the family farmers that Abraham Lincoln [in signing legislation, simultaneous with the Morrill Act, establishing the Department of Agriculture] charged the Department to protect. The well being of these people and their ability to stay on the land are, to a large degree, dependent on appropriate research and extension efforts." S.Rpt. No. 95-180, 95th Cong., 1st Sess. 161 (1977).

Thus, the primary beneficiary of the land grant complex was and is the small non-corporate farmer most in need of government assistance.[56]

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56. This statutory analysis is corroborated by views of our land reform policies from without the United States. For example, in 1969 Doreen Warriner wrote of our American conception of "integral land reform":

> Though the American conception of reform is based on the family farm as its ideal, and in this respect fits in with the liberal tradition, it departs from it by insisting that the individual farm enterprise must be butressed by "a comprehensive program", including supervised credit and extension, and organized marketing. . . . To provide these services in the United States is the function of the Department of Agriculture. *Land Reform in Principle and Practice* 59 (Oxford, 1969).

II. Application of the Pervasive Continuity of Legislative Purpose Doctrine

Given the historical predicate just set out in Part I, how do the petitioners fulfill the imperative for family-sized farms enunciated by so many Congresses? The Bryant class intervenor-defendants fail to meet that criterion.

Respondents' careful review of the trial court record has illumined the large-scale character of this class of excess landholders represented by petitioner Bryant. The Economics, Statistics, and Cooperatives Service of the U.S. Department of Agriculture has further highlighted the magnitude of the Imperial Valley's deviance from the family-sized farm principle:

> The Imperial Irrigation District is the second largest irrigation district in the State, with a gross area of 900,000 acres and 445,000 irrigated acres in 1976. The district is located in Imperial County, which is the southeasterly-most county in the State, bordered by the Colorado River and Mexico . . . . Rainfall averages about 2 inches annually.
>
> . . . .
>
> Imperial County reported a median family income of $8,257 in 1970, about $2,475 below the State median income, with 16 percent of its families below the poverty level.[57] Major cities and towns in the district are: El Centro (pop. 21,150); Brawley (pop. 13,850); Calexico (pop. 13,050) and Holtville (pop. 4,450).
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> . . . .

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57. County Supervisors Association of California, *California County Fact Book* 1976-77.

. . . In 1974, there were 715 farming operations in Imperial County averaging 716 acres per farm . . . . distributed as follows:

Land in Farms	*Number of Farms*
Less than 50 acres	194
50 to 179 acres	141
180 to 499 acres	139
500 to 999 acres	91
1,000 to 1,999 acres	73
2,000 acres and over	77

Farming operations in the Imperial Valley have traditionally been large-scale, specializing in alfalfa hay for the Los Angeles milk-shed, cotton, feed grains, and winter vegetables. Twenty percent of the farms in Imperial County exceed 1,000 acres. Winter vegetable production is especially risky due to the high chance of a killing frost.

. . . .

> . . . The U.S. Department of the Interior has estimated that 265,000 acres (60 percent of the irrigated acreage) in the District are excess land. It seems likely that much of the excess land is farmed by the 150 farming operations that exceeded 1,000 acres in 1974 and is probably owned by . . . 204 partnerships and corporations . . . .[58]

Perhaps the distinctions between landownership in the Imperial Valley, and the rest of California, can be summarized in the fact that the average irrigated farm in the Valley has 716 acres while the average irrigated farm in California has 164 acres.[59]

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58. *The U.S. Department of the Interior's Proposed Rules for Enforcement of the Reclamation Act of 1902: An Economic Impact Analysis,* No. ECCS-04, 13 and 17 (1978).

59. *Id.,* vii & 17.

In his second annual report to the Congress on the status of the family farm, the Secretary of Agriculture states that nationwide "[m]ultiownership farms (partnerships and corporations) accounted for only ten percent of farms in 1974, but being larger they sold nearly a third of all farm products and farmed one-fourth of the land."[60] Yet in the District, multiownership farms account for twenty-eight percent of all farms and they farm fifty-nine percent of the land; in the District, over one-half of the irrigated acreage is excess lands. While this has not been a sudden development, under reclamation law it is an illegal state of affairs.[61]

Of course, acreage limitation is not a universal land policy, yet for the Imperial Valley which receives the substantial liquid dividends of the Colorado River from the All-American Canal at no cost,[62] it is a modest constraint for Congress to have required, the Department of Interior to have given effect, and for this Court to uphold.[63]

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60. Economics, Statistics, and Cooperatives Service, USDA, *Status of the Family Farm: Second Annual Report to the Congress,* Agricultural Economic Report No. 434, 7 (1979). This report is another manifestation of the concern for the family farm in that Congress mandated it on an annual basis in the 1977 Farm Bill, 7 U.S.C. § 2266 (discussed *supra,* in Part I, section H).

61. The historical background of large scale and absentee ownership is summarized in Taylor, *"Water, Land, and Environment, Imperial Valley: Law Caught In The Winds Of Politics,"* 13 NATURAL RESOURCES L.J. 1 (1973) and USDA, *Land Ownership and Operating Terms in Imperial Valley, California* (1942).

62. Section 1 of the Boulder Canyon Project Act, 45 Stat. 1057, L.App. 134a; plus all repayment costs have been and continue to be paid from hydroelectric power revenues. 322 F.Supp. 11, 14 (S.D. Calif. 1971) and 4 Tr. 477.

63. The principle that federally imposed strings accompany federal dollars is no longer novel. See generally, *King v. Smith,* 392 U.S. 309 (1968); F. Bosselman et al. *The Taking Issue—An Analysis of the Constitutional Limits of Land Use Control* (1973); B. Ackerman, *Private Property and the Constitution* (1977).

A. EXCESS LANDS MUST COMPLY WITH THE ACREAGE LIMITATION DESPITE "PRESENT PERFECTED RIGHTS"

The cardinal principle surrounding application of the acreage limitation of § 46 on excess lands is that absent the entering of a recordable contract, no project water is to be delivered. By a remediable historical accident, in the present case, deliveries have been made for some years in the Imperial Valley. Petitioners begin their briefs with a two-step frontal assault upon this requisite of all reclamation law.[64] They argue first that the Boulder Canyon Project Act on its face requires the satisfaction of the "present perfected [water] rights" of the Imperial Irrigation District irrespective of the excess character of any given landholding within the District. Second, they assert that the District, as a matter of California law, could not fail to deliver water to excess lands.

The vehicle for these contentions is § 6 of the Project Act which bows to Article VIII of the 1922 Colorado River Compact. The Ninth Circuit held that first contention is legitimate but the second is not.[65] The authority the court of appeals relied upon is not even discussed in the Petitioners' briefs, much less distinguished.[66] Section 6 is a limitation on the Secretary's authority but does not decide the issue of eligibility to receive Project Act water in the first instance. The terms and conditions for that eligibility is prescribed elsewhere—§ 46.

Petitioners' argument as to the means of enforcement and their allusion to an unconstitutional "taking"[67] is premature.[68] The long-term federal investment in America has

64. L. Br. 29-33, D. Br. 25-38.

65. 559 F.2d 509, 528-530.

66. *Madera Irrigation District v. All Persons,* 47 Cal.2d 681, 691-693, 306 P.2d 886, 892-893 (1957), *reversed on other grounds sub nom. Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275 (1958); see also Calif. Water Code § 23200 [West].

67. D. Br. 32.

68. See *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275, 297 (1958).

been in opportunities for its people. In the ever expanding network of family-sized farm settlement and development laws the federal government has responded to the evolving needs of the time and place but always for the benefit of the "little fellow." Thus when abuses of the Desert Land Act, connivance around the Reclamation Act of 1902, and the Fact Finders report led to the Omnibus Adjustment Act of 1926, it was all not to be blithely forgotten in the Boulder Canyon Project Act.

B. THERE IS AN ACREAGE LIMITATION IN THE BOULDER CANYON PROJECT ACT

The District in its brief before this Court presumes that the language of the Project Act is insufficiently clear.[69] Plunging into the voluminous history of the Swing-Johnson bills,[70] both the landowners and the District build a "house of cards" argument upon snatches of testimony during the third but unsuccessful legislative round in the second session of the 69th Congress.[71] Specifically, they pin their hopes upon H.R. 9826 (69th Cong. 2nd Sess.) which never even went to the House floor.[72] Regarding the final round by the Swing-Johnson team, they emphasize the absence of explicit floor discussion of an acreage limitation in § 14.

The purpose of the historical foundation which *amici* have laid in Part I is to demonstrate that in comparison

69. D. Br. 38-46.

70. See generally the analysis of the Ninth Circuit 559 F.2d 509, 532-536.

71. L.Br. 44-46; D.Br. 40-43.

72. L.Br. 48-51; D.Br. 43-46.

with over a century of consistent, explicit, and ever-expanding support for family-sized farms in congressional enactments, the petitioners "best bid" is a surface treatment which overemphasizes the inessential in the legislative history of the Project Act. The landowners devote an entire section of their brief to the argument that what fragmentary legislative history there is should be given "great deference" so as to avoid "the risk of distortion from subsequent events that threatens *de novo* analysis today."[73]

Much space both in respondents' as well as *amici's* brief has been devoted to developing the factually complex as well as historically intertwined context of the Imperial Valley, the Boulder Canyon Project Act, and well over a century of land distribution, agricultural science extension, and water development legislation. Such continuity of legislative purpose shows that deference is appropriate toward a construction of the Project Act incorporating the acreage limitation tenet of the family-sized farm principle.

III. Enforcement Will Cause Neither Chaos Nor Inequity. Indeed, Enforcement Will Cause the Type of Prosperity Originally Intended by Congress

The Bryant class of excess landowners portray their excess landholdings as part of a thriving, autonomous farm community three-quarters of a century old. L. Br. 20. They are disingenuous in one significant respect: the contention that the present vitality of the Imperial Valley has little relationship to the Boulder Canyon Project Act. This Court took cognizance of the helpless and bleak plight of those in the Valley *prior* to the Project in its 1963 opinion in *Arizona v. California,* 373 U.S. 546, 552-555.

73. L.Br. 53-56.

In the second half of the nineteenth century a group of people interested in California's Imperial Valley conceived plans to divert water from the mainstream of the Colorado to give life and growth to the parched and barren soil of that valley. As the most feasible route was through Mexico, a Mexican corporation was formed and a canal dug partly in Mexico and partly in the United States. Difficulties which arose because the canal was subject to the sovereignty of both countries generated hopes in this country that some day there would be a canal wholly within the United States, an All-American canal. [Footnote omitted.]

During the latter part of the nineteenth and the first part of the twentieth centuries, people in the Southwest continued to seek new ways to satisfy their water needs, which by that time were increasing rapidly as new settlers moved into this fast-developing region. But none of the more or less primitive diversions made from the mainstream of the Colorado conserved enough water to meet the growing needs of the basin. The natural flow of the Colorado was too erratic, the river at many places in canyons too deep, and the engineering and economic hurdles too great for small farmers, larger groups, or even States to build storage dams, construct canals, and install the expensive works necessary for a dependable year-round water supply. Nor were droughts the basin's only problem; spring floods due to melting snows and seasonal storms were a recurring menace, especially disastrous in California's Imperial Valley where, even after the Mexican canal provided a more dependable water supply, the threat of flood remained at least as serious as before. Another troublesome problem was the erosion of land and the deposit of silt which fouled waters, choked irrigation works, and damaged good farmland and crops.

It is not surprising that the pressing necessity to transform the erratic and often destructive flow of the Colorado River into a controlled and dependable water supply desperately needed in so many States began to

be talked about and recognized as far more than a purely local problem which could be solved on a farmer-by-farmer, group-by-group, or even state-by-state basis, desirable as this kind of solution might have been. The inadequacy of a local solution was recognized in the Report of the All-American Canal Board of the United States Department of the Interior on July 22, 1919, which detailed the widespread benefits that could be expected from construction by the United States of a large reservoir on the mainstream of the Colorado and an All-American canal to the Imperial Valley. [Footnote omitted.] Some months later, May 18, 1920, Congress passed a bill offered by Congressman Kinkaid of Nebraska directing the Secretary of the Interior to make a study and report of diversions which might be made from the Colorado River for irrigation in the Imperial Valley. [Footnote omitted.] The Fall-Davis Report, [Footnote omitted.] submitted to Congress in compliance with the Kinkaid Act, began by declaring, "The control of the floods and development of the resources of the Colorado River are peculiarly national problems . . ." [Footnote omitted.] and then went on to give reasons why this was so, concluding with the statement that the job was so big that only the Federal Government could do it. [Foot note omitted.] Quite naturally, therefore, the Report recommended that the United States construct as a government project not only an all-American canal from the Colorado River to the Imperial Valley but also a dam and reservoir at or near Boulder Canyon. [Footnote omitted.][74]

In short, as this Court long ago recognized, without the huge infusion of funds provided by nearly two hundred

74. That precarious posture is also prominently noted as an urgent need in *The Hoover Dam Power and Water Contracts and Related Data* 3-4 (Department of Interior, 1933); *see also* Gates, *History of Public Land Law Development* 686 (1968) and N. Hundley, Jr., *Water and the West* 38, 39 and 170 (1975).

million Americans, the 715 farms of the Imperial Valley would have returned to desert lands. Now, the Valley is indeed prosperous. It is not too much, nor inequitable, to ask the excess landowners to share some of that prosperity for to do so was the very reason that all of those federal taxpayers provided their hard-earned taxes.

The excess landowners also claim inequity in that if they sell their excess landholdings, they will have to sell "at appraised prices far below the investment costs." L. Br. 20. But this assertion can only evoke curiosity for as part of the District's Appendix to their Petition for Certiorari is the proposed regulation of the Department of Interior of August 22, 1977, which explicitly provides for an appraisal pricing process which encompasses the value of all improvements. D. App. 239a-240a.

Finally, they rhetorically question how the authors of § 46 could intend to penalize the farmer who had spent his life making this land productive. L. Br. 20. Of course, argument presented with such succinct flourish can easily overlook the subsidy value of $1,000.00 plus per acre per year[75] which they have received for much longer than the usual ten year recordable contract period. Likewise, the landowners overlook those who have long labored but been denied the breakup covenanted under the reclamation law. Professor Taylor reminds us of James Bryce's specific criticism of California's land system where immigrant Mexicans have been employed seasonally in ever larger numbers yet denied the opportunity of landownership.[76] But even more pointed are the contemporary statistics which show how that polarization of this rural society continues unabated.

75. See Respondents' Brief, "Statement of the Case".

76. *Mexican Migration And The 160 Acre Limitation*, 63 CALIF. L.REV. 732, 738-740 (1975), citing Bryce, 2 *The American Commonwealth* 427 (7th ed. 1923).

> While in the country as a whole, the average percentage of "farm personnel" belonging to the "lower class" in 1959 was 31.1 percent, in California the percentage was 55.7, and in Arizona 71.4. In Imperial Valley, California, where reclamation law is unobserved, the "lower class" mostly of Mexican birth or parentage, reached 87.3 percent.[77]

Enforcement of the acreage limitation will create a much greater likelihood that this economic polarization of rural California will abate. Small family-sized farms can prosper. A 1977 study demonstrated that seventeen different vegetable crops could produce an income equal to the median family income in California on plots of land ranging from 7.1 acres for lettuce to 66.7 acres for spinach; fifteen of the 17 crops could produce at that income level on less than 40 acres. "The Family Farm In California: Report of the Small Farm Viability Project" (Calif. Employment Development Dept. 1977). In this light, it should be emphasized that the average irrigated farm in California has 164 acres. U.S. Dept. of Agriculture, "The U.S. Department of the Interior's Proposed Rules for Enforcement of the Reclamation Act of 1902: An Economic Impact Analysis," Feb. 1978, p. vii. Since owners of farms this size also have an average non-farm income of over $15,000 per year, *id.*, at 23, their total income would exceed $30,000 per year.

A small, family-sized farm base would provide for more prosperous rural communities. The intent of Congress was not only to produce food on small, family-sized farms but it was also to *thereby* foster prosperity and economic de-

77. Quoting T.L. Smith, "A Study of Social Stratification in the Agricultural Sections of the U.S.," 34 *Rural Sociology* 496, 506-08 (1969). Unfortunately this research shows little or no social progress since Professor Taylor's 1928 monograph ***Mexican Labor in the United States, Imperial Valley*** (Univ. of Calif. Press [1930] and Johnson Reprint Corp. [1966], especially 29-40 and 61-71).

mocracy in rural America. In 1946, the U.S. Senate Select Committee on Small Business sponsored a study of two communities in California's San Joaquin Valley.[78] This now classic study of anthropologist Walter Goldschmidt compared the communities of Arvin, in Kern County, and Dinuba, in Tulare County. The major distinction between them was that Arvin was surrounded by large commercial farms while Dinuba was surrounded by mostly small, family farms. The agricultural production volumes of the two communities were equivalent, however. In other words the economic base was approximately the same. The major conclusion of Professor Goldschmidt was that Dinuba had a more active economic and social life than Arvin. In 1977, 30 years later, the two communities were studied again to determine what had occurred through the passage of time. See "The Family Farm In California: Report of the Small Farm Viability Project" (Calif. Employment Development Dept. 1977), at 18-30. In general, the population of Dinuba (the small farm town) had grown at a faster and steadier rate; the large farm community had become more dependant on outside sources of funds because of an eroded local tax base; Dinuba's residents had attained a higher median level of school years completed; Dinuba continued to have twice as many small businesses, four times the number of social and civic organizations, twice as many churches; Dinuba has five parks and eight playgrounds, while Arvin has two parks and no playgrounds. Another significant distinction was that 42% of Arvin's voting age population was registered, while 54% were registered in Dinuba; in Arvin, only 75% of those registered actually voted, while 91% of Dinuba's registered voters exercised that right. *Id.*

78. ***Small Business and The Community: A Study in the Central Valley of California on Effects of Scale of Farm Operations,*** Sen. Comm. Print No. 13, 79th Cong. 2nd Sess. (1946).

IV. Petitioners' Procedural Pleas Are Without Merit

A. RESPONDENTS HAVE STANDING TO ENFORCE § 46 OF THE OMNIBUS ADJUSTMENT ACT OF 1926

The opportunity for ownership . . excess land holdings in the Imperial Valley by the Yellen group is a statutorily protected interest under §§ 12 and 14 of the Boulder Canyon Project Act of 1928.[79]

By these reclamation statutes, as well as the interrelated family-sized farm support acts discussed in Part I *supra,* Congress has pursued an involved but consistent course for the benefit of family-sized farmers.[80] They reflect the recognition that wealth (including land and water) concentration in the hands of producers is economically inefficient as well as socially inequitable.[81]

The narrowly drawn beneficiaries under the Project Act are those like respondents who stand to benefit directly from the breakup of excess lands in this project area.[82]

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79. Set out at L.App. 146a-148a.

80. The respondents are special beneficiaries of the Project Act as the proposed regulations to implement the residency requirement of the reclamation law provide that only those persons whose principal place of residence is within fifty miles of the excess lands of the Imperial Valley will be "eligible nonexcess owners." Part 426.4(l) of Title 43 C.F.R., Dist. App. 229a. This is reaffirmed in the recent Opinion of the Solicitor, M-36919—Pub. Lands Dec.—(December 6, 1979).

81. J. M. Blair, *Economic Concentration—Structure, Behavior, and Public Policy* (1972); *Role of Giant Corporation: Hearings the Subcommittee on Monopoly of the Senate Select Committee on Small Business,* 92nd Cong., 1st & 2d Sess., parts 3, 3A, and 3B (1971-72).

82. The only project area in issue is the Imperial Valley. The petitioner Imperial Irrigation District has chosen hyperbole to miscast the position of the respondents. Dist. Br. 9 and 73-75. Without the need to resort to such invective, *amici* have in Part I of this brief set out the consistent intentions of many Congresses to insure the break up of even pre-existing monopoly on private lands by denying project water to them. See Chief Judge Browning's opinion in *U.S. v. Tulare Lake Canal Co.,* 535 F.2d 1093, 1119-1122 (9th Cir. 1976), *cert denied* 429 U.S. 1121 (1977); *see also* Taylor, *The Excess Land Law: Execution of a Public Policy,* 64 YALE L.J. 477, 484 (1955).

The Ninth Circuit, in its principal opinion as well as its memorandum on petition for rehearing, went to painstaking lengths to explain the clear grounds for standing by the respondents under even the most exhaustive of this Court's standing pronouncements. Thus, in addition to an examination of the Constitutional requisites of Article III, the Ninth Circuit considered the prudential constraints on standing which this Court has articulated in statutory contexts, such as those presented by the case at bar.

The respondents alleged in support of their motion for permission to intervene before the district court that they resided within the boundaries of the Imperial Irrigation District. Con. App. 323a-348a. Most of them were farmworkers who owned no farm land elsewhere and they desired to purchase some of the "excess lands" which are irrigated with water delivered by the All-American Canal. Had the government prevailed at trial before District Judge Turrentine, these "excess lands" are those whose sale § 46 of the Omnibus Adjustment Act requires. Respondents further alleged that they were within the class of beneficiaries of the reclamation laws which were the focus of the government's complaint. Con. App. 267a-274a. Thus the Ninth Circuit concluded: "Read, as it must be, in the light of the government's complaint, [the intervenor-respondents'] interest is in the purchase of farm lands at prices to be set in accord with the dictates of Section 46." *U.S. v. Imperial Irrigation District,* 559 F.2d 509, 521 (9th Cir. 1977).

We first look then, as did the Ninth Circuit panel, to what is the "injury in fact, economic or otherwise."[83] Before the district court it was stipulated that there were approximately 800 excess landowners in the Imperial Irrigation District and that their aggregate excess holdings were on the order of 233,000 acres. *U.S. v. Imperial Irrigation District,* 322 F.Supp. 11, 12 (S.D. Cal. 1971). Because of the Circuit's previous decision in *U.S. v. Tulare Lake Canal Co.,* 535 F.2d 1093 (1976), *cert. denied* 429 U.S. 1121 (1977), the panel held that the sale of any of these excess properties in accordance with the below-market-price constraint of § 46 would put family-size farms within the economic reach of respondents. Thus their injury is not being able to purchase any of these excess lands. That injury is neither dependent upon which of the 233,000 acres was desired nor on the specific dollar amount of price reduction accomplished under the *Tulare* formula. What is certain and constitutes an injury if § 46 is not given effect is that the sales price of none of these fertile properties will be reduced.[84] As the Ninth Circuit flatly characterized the situation: "In the absence of a requirement that [excess] landowners execute a [recordable] contract [as § 46 requires, providing for below market price sales] in order to receive irrigation water, it is inconceivable that any landowner would sell any land at prices substantially below current market prices." 559 F.2d at 522.

On rehearing petitions, petitioners' thrust was to the "causation corollary" to the injury in fact requirement.[85]

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83. L. Tribe, *American Constitutional Law* § 3-17 (1978).

84. Also from Professor Richard Stewart's synthesis on standing, it is plain that respondents are highly conventional litigants and hardly exotic in their posture before this Court as intervenors. *The Reformation of American Administrative Law,* 88 HARV.L.REV. 1667, 1723-47 (1975). They have asserted in their affidavits "material interests" in the opportunity for ownership of excess acreage served by the Boulder Canyon Project water whose delivery from the Colorado River is the *sine qua non* of its rich agricultural productivity. Moreover, the character of their role is as "sole plaintiffs" and thus as Professor Stewart explains

> [O]rdinarily the legal system does not undertake to examine the adequacy of such representation any more than we seek to consider the rationality or efficacy with which an individual identifies and pursues his own interests generally. 88 HARV.L. REV. at 1742.

His elucidation of the origins of the "injury in fact" requirement is helpful for evaluating the fitness of the Yellen group as intervenor respondents.

> The ultimate ground of the "injury in fact" test, reminiscent of the common law's focus on the protection of material interests,[footnote omitted] may be in the contractarian theory of government. Put simply the theory is this: the justification for government lies in individuals' willingness to assent to a scheme of mutual cooperation that increases individuals' opportunity to satisfy their preferences. [footnote omitted] Social action, when limited to the provision and allocation of material advantages, requires no general agreement on personal preferences or values. So long as only material interests are accorded protection by law, rules can be formulated which will enable each individual to pursue his own ends through a system of reciprocity that increases wealth, leisure, and the like, thus enlarging material opportunities for all. [footnote omitted] 88 HARV. L.REV. at 1739.

The scheme for "mutual cooperation" here was that of fostering family-sized agricultural opportunities in the expansion into and settlement of the Western United States. More particularly it was that of establishing a stable irrigation source for the otherwise unproductive Imperial Valley. The "allocation of material advantage" here was balanced via the three constraints of the residency requirement, the acreage limitation, and the requirement of a recordable contract. While "social action" in such a context may "require no general agreement on personal preferences or values," herein family-sized farms as social units have been properly exalted in legislative rules as well as in American political theory. It is the "protection" of those "material interests" which the respondents have invoked and their foundation in Jeffersonian ideals argues only *a fortiori* for allowance of their standing.

85. Tribe, *supra,* § 3-21.

In its principal opinion the Ninth Circuit panel had held that redress to intervenor-respondents' claims lay in a court order declaring that § 46 of the Omnibus Adjustment Act was applicable to the Boulder Canyon Project Act and therefore the Imperial Valley. Because the Imperial Irrigation District was already present.

> [t]here would be no need to bring additional parties before the district court before such an order could be issued. Once there was such a court order, redress of the injury would not depend upon the uncertain responses of the large landowners or the land market. While not all landholders might execute the contracts required by Section 46, the vast majority of the land in use in the Imperial Valley Irrigation District is engaged in agricultural production and it would be highly improbable that all of the large holdings of irrigable land would be withdrawn from agricultural use in order to avoid the requirements of Section 46. Once the appraisal process was completed, formerly large agricultural landholdings would be available in small parcels at prices below the current market price. 559 F.2d at 522.

Twenty months and several briefs later, the panel reaffirmed this simple but accurate logic, it recommended against rehearing in banc, and no circuit judge asked for a vote on those suggestions. 595 F.2d 525, 527-28 (1979).

A closely related argument advanced by petitioners is that the injury to the Yellen group is unlikely to be redressed if the requested relief is granted because of the excess landowners' prerogatives as sellers. The Ninth Circuit cogently replied that this Court's holding in *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252 (1977), was cause to doubt that the test for standing required a showing of certainty that

if they prevailed they would become landowners. The Circuit viewed respondents as in a position similar to the developer in *Arlington Heights*. Relief there would not guarantee actual construction, as financing or similar matters, unrelated to the lawsuit, might interfere. Yet this Court found that relief for the developer in *Arlington Heights* was still necessary for construction to occur and that the developer therefore had the requisite stake for standing to sue. 429 U.S. at 260-61. Similarly while there are other factors which might thwart intervenor-respondents from purchasing excess lands in the Imperial Irrigation District, "the land never will be available at below current market prices unless Section 46 is held applicable." 559 F.2d at 523.[86]

Much reliance has been placed by the petitioners on *Warth v. Seldin,* 422 U.S. 490 (1975). Their dependence upon it is misplaced. In Penfield, New York, there were no identified lands in issue upon which potential residences for persons of low and moderate income were to be built. Rather there was a constitutional challenge to the town's zoning ordinance premised upon the speculation that "but for" the extensive single-family home requirements for 98% of the town's vacant land, housing affordable to plaintiff Robert Warth and others, would be built.

The 233,000 excess acres in the Imperial Irrigation District do not lack for identifiability. Respondents are already resident in the environs and therefore already have fulfilled part 246.4(l) of Title 43 C.F.R.[87] of the Interior Secretary's

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86. The point was re-enunciated in the Circuit opinion on rehearing petitions. 595 F.2d at 528.

87. Defining an [e]ligible nonexcess owner is an individual who (1) has his or her principal place of residence on or in the neighborhood of the land or who has under oath stated his or her intent to establish such principal place of residence within three years of

implementing regulations.[88] Moreover, they are the beneficiaries of the statutory guarantee of acreage limitations in reclamation project areas such as the Imperial Valley.

In respondents' brief this Court's attention is more properly drawn again to the *Village of Arlington Heights* case which the Ninth Circuit also found persuasive.[89] Specifically, particular attention should be given to the party Ransom who was held to have "averred an actionable causal relationship between [the village's] zoning practices and his injury" (429 U.S. at 264) which was a "quest for housing nearer his employment." The injury and interest of respondents in the case at bar is far greater than his.

To uphold the standing of intervenor-respondents in this long litigation is finally even more appropriate because of their perseverance. One can think of few examples of more "concrete adversariness" than the nearly thirteen years since the respondents first sought participation as *amicus curiae* on August 7, 1967, before the district court. Con. App. 358a.

B. COLLATERAL ESTOPPEL DOES NOT PRECLUDE RESPONDENTS' CLAIM THAT THE ACREAGE LIMITATION APPLIES TO PRIVATE LANDS IN THE IMPERIAL IRRIGATION DISTRICT

Petitioners' defense to respondents' claims to enforce § 46 is governed by principles of collateral estoppel rather

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acquisition of the land; (2) will not, after the acquisition, be the owner of more than 160 acres of land which receives water from any Federal project governed by reclamation law; and (3) has met all other requirements of reclamation law and these rules. Dist. App. 229a.

88. Dist. App. 217a-242a.

89. *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976) is even less relevant than *Werth.* In *Simon,* profound causation questions and incomplete party participation yielded a negative holding on standing. Neither of those deficiencies is present here.

than bar or merger.[90] The distinction between bar or merger of claims and estoppel of issues previously litigated is well recognized. See, for example, *Bernhard v. Bank of America,* 19 Cal.2d 807, 810, 122 P.2d 892 (1942); *Cromwell v. County of Sac,* 94 U.S. 351, 352-353 (1877).

Respondents and their predecessors, if any, defaulted in *Hewes.*[91] Under well settled rules of pleading in California and elsewhere only the relief prayed for in the complaint could be entered against a defendant. The allegations of the *Hewes* complaint simply presented the chronology of events leading up to the All-American Canal Contract including the ratifying election. The relief prayed for was a declaration of

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90. *The Restatement of Judgments, Second* refers to collateral estoppel as "issue preclusion." See, for example, § 45 (Tent. Draft No. 1, 1973).

91. In *Hewes v. All Persons,* an *in rem* action brought by the Imperial Irrigation District in the California Superior Court for the County of Imperial, the District sought a judgment validating the contract for construction of the All-American Canal, made between the District and the United States. (The *Hewes* complaint is set forth at the end of this brief as App. A.) Service of process was by publication. Charles Malan, an owner of more than 160 acres in the District, answered as a defendant praying that the contract "be declared illegal, invalid and not obligatory upon the said Irrigation District." (The Malan answer is set forth herein as App. B.) He also filed an independent action seeking to declare the contract void and to enjoin the District from spending any funds to carry it out. (*Hewes* opinion, L. App. 105a, 106a-107a.)

Malan claimed, both in his complaint and in his answer (*Hewes* opinion, L. App. 102a and 109a), that the contract was illegal because the reclamation laws prohibited owners of more than 160 acres from receiving federally subsidized water (Malan answer, pp. 25-26, App. B). He moved to consolidate his case with that of the District, but the court sustained the District's demurrer to his complaint without leave to amend, thus never ruling on his motion (*Hewes* opinion, L. App. at 107a and 109a). The case went to trial on his answer, and the court determined that under the contract he would not be denied water from the All-American Canal though he owned more than 160 acres (*Hewes* findings of fact and conclusions of law, Dist. App. at 144a and 149a). The court entered the default of all defendants who did not answer (*Hewes* findings, Dist. App. at 121a-122a).

validity.[92] There was no reference to the 160 acre limitation of reclamation law until Malan filed his answer. The affirmative defense raised by Malan concerning the average limitation was in issue, if at all, between the District (whose directors were plaintiffs in *Hewes*) and Malan. Malan's affirmative defenses did not expand the complaint and its prayer against non-appearing and defaulting parties who were given the "all persons" designation. In California, an *in rem* judgment is only valid against non-appearing parties to the extent of the complaint on file at the time the summons issues. *Board of Directors of Modesto Irrigation District v. Tregea,* 88 Cal. 334 (1891). Under the procedure followed in *Hewes,* the judgment would not be *res judicata* against the entire world on the new matter raised by Malan. If the judgment on the application of the acreage limitation is preclusive, it would be so only under the doctrine of collateral estoppel.

Acreage limitation issues are not pertinent to issues in a contract confirmation proceeding. The California Supreme Court's decision in *Ivanhoe Irrigation District v. All Parties and Persons,* 53 Cal.2d 692, 727-28, 3 Cal.Rptr. 317 (1960), (hereafter, "*Ivanhoe* II") made it clear that issues regarding distribution and sale of water are not cognizable in

92. The District's prayer in *Hewes* asked the court to:
> [D]etermine that that certain contract . . . between the United States of America and Imperial Irrigation District . . . is and that each and every of the terms thereof are lawful and within the lawful powers of Imperial Irrigation District to make, enter into and carry out in accordance with its terms, and all proceedings leading up to and including the execution thereof have been performed in the manner required by law and that said contract is valid and legally binding upon said Imperial Irrigation District and that this Court make and cause to be entered its judgment establishing and adjudging said contract to be valid and a legal obligation of said District and for such other, further and additional relief as is meet in the premises.

contract confirmation proceedings under the Irrigation District Federal Cooperation Law.[93] The court described such a proceeding as *in rem* in nature and said:

> The duty of the trial court was to determine whether or not the contract was valid and entitled to confirmation. It was not to determine what the various parties claimed were their rights and duties under the contract. Such claims could be settled only by adjudication between the parties themselves. Thus the claims of parties, especially parties not before the court, were irrelevant. 53 Cal.2d at 727-28.

Thus, the court held that if any parties like McCracken wished to contest application of acreage limits expressly included in the contract for the Central Valley Project, they must do so in a separate proceeding.

Similarly, in the *Hewes* case issues regarding who could receive subsidized water and on how many acres were not properly part of the *in rem* confirmation proceedings. While Charles Malan made them an issue for himself by his answer and the Superior Court accepted the issue as properly within the scope of the proceedings, neither respondents nor their predecessors were his privies or were in any sense represented by him.[94] Their interests and his are, of course, contrary, since he could not receive water brought by the All-American Canal for his excess acreage if the reclamation laws limiting water delivery for any one owner applied to lands in the District. By contrast, respondents seek this very result.

93. California Water Code § 23175 *et seq.* Section 23225 of the Code is the codification of Cal. Stats. 1917, ch. 160, § 3 pursuant to which the District invoked the jurisdiction of the California Supreme Court in the *Hewes* case.

94. It is apparent from the pleadings and the findings that neither his answer nor his complaint were pleaded as a class action.

Under pleading rules in California, Malan could not broaden the scope of the District's complaint by his answer. The effect of the *in rem* judgment in *Hewes* is to bind only the property within the Imperial Irrigation District and the parties *only* as to issues actually litigated by the parties who appeared in that action. The *Restatement of Judgments, Second,* § 73 (Tent. Draft No. 1, 1973) states the general rule that an *in rem* action determines the interests of all persons in the world in the thing at issue in the action. In addition, Comment *a* to § 73 notes that no issues are precluded by an *in rem* judgment "except as between parties *appearing* and litigating particular issues. However, interests in the thing are conclusively determined even as to parties who default."[95] (Emphasis added.)

Section 73, Comment *d* makes clear that only those parties to an *in rem* proceeding *who actually appear* and litigate an issue as adversaries may be precluded from relitigating that issue. Moreover, the parties may only be precluded if determination of that issue was essential to the judgment.[96]

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95. Section 73 reads in relevant part:
A valid and final judgment in an action based only on jurisdiction to determine interests in a thing:
(a) Is conclusive as to those interests with regard to all persons, if the judgment purports to have that effect (traditionally described as "*in rem*") . . . and
. . . .
(c) Is conclusive between parties, in accordance with the rules of issue preclusion, as to any issues *actually litigated by them* and determined in the action. (Emphasis added.)

96. Comment *d* states in relevant part:
A valid judgment based only on jurisdiction over a thing is conclusive as to interests in the thing, even as to nonappearing parties (see Comment *a*). Such a judgment has no further conclusive effect except in accordance with the rules of issue preclusion set forth in §§ 68, 68.1. Under those rules, parties who have *appeared* in the action and litigated an issue as adversaries will normally be precluded from relitigating that issue if its determination was essential to the judgment. (Emphasis added.)

Thus, only the interests of respondents and their predecessors at the time of the *Hewes* litigation or now—as to contractual obligation affecting the lands within the district were conclusively determined by the *Hewes* judgment. No other issues were or could be determined by the Superior Court decree, most particularly because neither respondents nor their predecessors *appeared* in *Hewes.*

As mentioned earlier, Section 73, Comment *d* refers to the general rules of issue preclusion to determine what, if any, issues other than those interests in the *res* at issue are precluded. The *Restatement of Judgments, Second,* § 68 (Tent. Draft No. 1, 1973) states the general rule of issue preclusion:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim.

California law is in accord with the *Restatement. English v. English,* 9 Cal.2d 358, 361, 70 P.2d 625 (1937); *Price v. Sixth District Agricultural Ass'n.,* 201 Cal.502, 258 P. 387 (1927).[97]

Here, the question is whether the Superior Court judgment in *Hewes v. All Persons* precludes respondents from asserting that § 46 of the Omnibus Adjustment Act of 1926 applies to the Imperial Valley. Neither they nor their predecessors in interest have ever previously litigated that issue.

Nowhere in the *Hewes* complaint was it alleged that acreage limitation did not apply. Moreover, the District was

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97. On the prerequisite of actual litigation of an issue between the parties in order to justify preclusion, see *Developments—Res Judicata,* 65 HARV.L.REV. 818, 840-842 (1952).

actively opposed to that interpretation of the contract or of § 46 of the Omnibus Adjustment Act of 1926.[98]

98. See 559 F.2d 509, 526 ftn. 31.

Though Charles Malan put the acreage limitation in issue by his answer (and tried to consolidate with *Hewes* his independent action raising the same issues), his pleadings joined issue only as between him and the District. Respondents cannot be bound by his litigation of the issue since neither they nor their predecessors were in privity with him. *Zaragosa v. Craven,* 33 Cal.2d 315, 202 P.3d 73 (1949). Thus, they were not in any sense represented by him in the defense he asserted. Moreover, since he was an owner of more than 160 acres, he desired a ruling not applying any limits for receiving subsidized water, while respondents want the contrary. His motives for raising the issue must be considered *prima facie* suspect so far as any claim that he adequately represented their interests.

Thus, respondents and the District have not litigated the present issue.[99] On this basis alone, then, respondents are not precluded from now seeking judgment to give effect to the acreage limitation.

Exceptions to issue preclusion are appropriate here even if the Court determines that the acreage limitation issue was litigated by respondents and was essential to the *Hewes* judgment. *Amici* have shown that precluding respondents from seeking to impose acreage limitation in the Imperial Irrigation District is not appropriate because they did not litigate the issue and because determination of the issue was not essential to the *Hewes* judgment.

99. The landowners here are mere intervenors and, as such, support the District's position. Thus, for preclusion doctrine purposes, the relevant parties are the Imperial Irrigation District and respondents and their privies, if any.

Exceptions are made regarding matters of the important public policy. California, for example, recognizes an injustice exception to issue preclusion. In *Guardianship of DiCarlo,* 3 Cal.2d 225, 235, 44 P.2d 562 (1935), the California Supreme Court said: "That principle [preclusion] is not to be applied so rigidly as to defeat the ends of justice; there are exceptions to it, based upon important reasons of policy." *Greenfield v. Mather,* 32 Cal.2d 23, 35, 194 P.2d 1 (1948), reiterates this exception. Most recently, in *Hight v. Hight,* 67 Cal.App. 3d 498, 503, 136 Cal.Rptr. 685 (1977), the exception was applied where a Colorado mother was represented by the district attorney in a reciprocal support enforcement proceeding in California but did not herself appear. Under the special circumstances of that case where she was a resident of another state and was not adequately represented by the district attorney, the court approved the trial court's exercise of discretion in refusing to preclude her subsequent action in California for support, saying that she did not have "fair opportunity to litigate" in the previous proceeding. *Id.*[100]

Thus, in the present case, even if this Court determines that all the factors for collateral estoppel were present in the *Hewes* judgment, it should still uphold the Ninth Circuit's exercise of discretion to permit respondents to litigate the acreage limitation issues on appeal. The peculiar circumstances of the *Hewes* case do not furnish a sound basis for refusing respondents a fair opportunity to now litigate the issue. There is a national policy of great impor-

100. See *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 328, 99 S.Ct. 645, 650 (1979), where the Court said: "Although neither judge, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard."

tance to be upheld here, a policy repeated since the Ordinance of 1785. Respondents seek to bridge the gap from policy to reality. To preclude them from urging the courts to cross that bridge would certainly defeat the ends of justice.

As the California Supreme Court recently acknowledged, there is "sound judicial policy against applying collateral estoppel in cases which concern matters of important public interest." *Chern v. Bank of America,* 15 Cal.3d 866, 872, 127 Cal.Rptr. 110 (1976); *Louis Stores, Inc. v. Dept of Alcoholic Beverage Control,* 57 Cal.2d 749, 757-58, 22 Cal. Rptr. 14 (1962). In *Chern,* the interest that the court allowed the plaintiff to protect even though she had previously litigated and lost the same issue against another party was the public interest evidenced by the California Legislature in its "comprehensive scheme of banking and financial regulations." 15 Cal.3d at 872. Likewise, in the present case, respondents seek to vindicate an intricate and comprehensive scheme of laws intended to specifically benefit small farmers, rather than large-scale agricultural operators, and to generally benefit rural communities.

Another exception is often made for legal issues where subsequent claims are substantially unrelated to a prior judgment or where there has been an intervening change in law. The *Restatement of Judgments, Second,* § 68.1 (Tent. Draft No. 4, 1977), states this exception as follows:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> . . . .
>
> (b) The issue is one of law and (i) the two actions involve claims that are substantially unrelated, or (ii) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws . . . .

California recognizes these exceptions. *Louis Stores, Inc., supra.*

Here, respondents are not precluded because application of acreage limitation to the Imperial Irrigation District is an issue of law, and the *Hewes* litigation and the present case are substantially unrelated claims. Whether § 46 of the Omnibus Adjustment Act of 1926 requires acreage limitation in the Imperial Valley is primarily a question of law. In order to determine the issue a court must construe provisions of that Act together with the Boulder Canyon Project Act and the Reclamation Act of 1902.

Neither are respondents precluded where the issue is one of law and the applicable legal context has changed since the *Hewes* decision. Since 1933 when *Hewes* was decided, two important administrative rulings, this Court's decision in *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275 (1958) and the Court of Appeals decision in *U.S. v. Tulare Lake Canal Co.,* 535 F.2d 1093 (9th Cir. 1976), *cert. denied* 429 U.S. 1121 (1977) have intervened.

In 1945, Fowler Harper, Solicitor for the Department of Interior, issued a formal opinion (78 I.D. 496, 533, Appendix H) ruling that the 160 acre limitation applied to land in the Coachella Valley County Water District, which receives water from the Boulder Canyon Project just as does the Imperial Irrigation District. This opinion, then, manifests the inconsistent interpretation between Secretary Ray Lyman Wilbur's informal letter, upon which the District

and the landowners depend so heavily, and that later, more rigorous legal review in Harper's opinion.[101]

In 1958, this Court decided in *McCracken, supra*, that the acreage limits of the reclamation laws applied to lands receiving water from the Central Valley Project in California. The Court rejected claims by McCracken, an owner of more than 160 acres, that his alleged pre-existing vested water rights permitted him to receive subsidized water for his excess lands. 357 U.S. at 290-91. *McCracken,* therefore, undermined Secretary Wilbur's letter saying that those landowners in the Imperial Irrigation District could receive subsidized water on excess lands where they had perfected their right to water from the Colorado River before the Boulder Canyon Project was built.

Then, in 1964, in another formal opinion, Solicitor of the Department of Interior, Frank J. Barry, specifically rejected the Wilbur letter and determined that the 160 acre limitation did apply to lands within the Imperial Irrigation District. (71 I.D. 496). These three rulings plus the *Tulare* decision changed the legal context in which this Court must consider respondents' claims.

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101. The Solicitor's Opinion severely undercut the strength of the Wilbur letter:

> A study of the [Wilbur] letter reveals that it completely disregards all other excess-land provisions except section 5 of the Reclamation Act of 1902. This construction of the Congressional intention is not borne out by a review of the proceedings of Congress .... Furthermore, an examination of the files reveals that the letter of the former Secretary [Wilbur] was written at the request of counsel of the Imperial District who wanted a ruling on the application of the excess land provisions "provided, that such ruling would be that the 160 acre limitation did not apply." Purposely, the letter of Secretary Wilbur never took the form of a formal decision. It was written solely for the purpose of giving partisan help to the Imperial Water District, as the delay of the final confirmation of the contract held up the construction of the All-American Canal. Besides, the time of the Hoover Administration was near its close. In less than ten days after the date of Secretary Wilbur's letter (February 24, 1933), President Roosevelt was inaugurated. 71 I.D. 496, 533, 547-548, Appendix H.

Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591 (1948) is the principal case supporting respondents' right to litigate application of the acreage limitation, despite *Hewes,* because of changes in the law. In *Sunnen,* this Court held that a prior determination that royalties under a license agreement were not taxable to the licensor was not conclusive in a subsequent action for a different tax year involving royalties received under a different agreement with parallel provisions, even though collateral estoppel might apply to royalties paid under the first agreement in subsequent years. 333 U.S. at 601-2.

This Court pointed out that collateral estoppel is a flexible doctrine that is capable of being applied to avoid undue disparity between similarly situated persons. *Sunnen,* 333 U.S. at 599; *United States v. Stone & Downer Co.,* 274 U.S. 225, 236-37; *Grandview Dairy v. Jones,* 157 F.2d 5 (2d Cir., 1946), *cert. den.* 329 U.S. 787. "That principle [collateral estoppel] is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers." 333 U.S. at 599.

In *Hewes,* the California Superior Court determined that vested rights of landowners in the Imperial Irrigation District to Colorado River water could not be taken without compensation. L. App. at 124a. As noted above, that ruling was cast in doubt by *McCracken, supra,* which rejected the vested rights claims of excess landowners receiving water from the Central Valley Project in California.

The basis for cases like *Sunnen, supra,* that refuse to preclude subsequent litigation is a desire for equal treatment of like subjects of a statutory scheme. 333 U.S. at 599. If a

court determined in the later case that a party was estopped, the party benefiting from this ruling would gain unfair commercial advantage or suffer unfair disadvantage as compared with other similarly situated persons who were not precluded by the prior litigation. In the same way here, landowners who can claim the benefit of the *Hewes* judgment, erroneous now in light of *McCracken*, gain an unfair advantage over their fellow citizens and residents of the Imperial Irrigation District whom Congress intended to benefit from the Boulder Canyon Project Act. If the Court accepts petitioners' preclusion claims, the landowners will be allowed to continue receiving federal project water forever and the egalitarian purpose envisioned by Congress will never be achieved.

Respondents' claim that they may not be precluded is also supported by *State Farm Mutual Automobile Insurance Co. v. Duel*, 324 U.S. 124 (1945). There, the intervening change of law was a decision by this Court decided while *Duel* was pending on appeal from the Wisconsin Supreme Court. This Court affirmed the Wisconsin Supreme Court's decision but held "*res judicata* is no defense where between the time of the first judgment and the second there has been an intervening decision or change in the law creating an altered situation." 324 U.S. at 162.

Yet another exception applies where

> [t]here is a clear and convincing need for a new determination of the issue (i) because of the potential adverse impact of the determination on the public interest . . . , or (iii) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

> *Restatement of Judgments, Second*, § 68.1(3) (Tent. Draft No. 4, 1977).[102]

Part I of this brief carefully explains the public interest in fostering small farms as expressed by Congress in numerous enactments. Agriculture in the Imperial Valley is dominated by very large landholdings.[103] All of these excess land owners irrigate with Colorado River water delivered through the All-American Canal built under the Boulder Canyon Project Act. To require them to execute recordable contracts or sell their excess lands will give an opportunity for ownership of valuable farm land for many others, including respondents. Enforcement of the acreage limitation is clearly in the public interest as consistently espoused by Congress over the years.

Another special circumstance of the present case justifying a refusal to preclude respondents' claims is the evolving notion of due process in acquiring jurisdiction *in rem* or *quasi-in-rem*. To preclude relitigation of an issue where the court rendering judgment had not obtained jurisdiction in accord with present requirements, at least as to issues not actually litigated where the party precluded lacked a fair opportunity to address those issues, would be a denial of due process. *Minichiello v. Rosenberg*, 410 F.2d 106, 112 (2d Cir. 1968).[104]

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102. *Amici* do not concede that the merits of respondents' claims have ever been litigated by the parties, thus giving rise to need for a "new determination." Only Charles Malan ever litigated the issue of acreage limits in the Imperial Irrigation District. Thus, he alone could be precluded from again addressing the merits of this case.

103. "The average irrigated farm in California has 164 acres of irrigated land." U.S. Dept. of Ag., *The U.S. Dept. of Interior's Proposed Rules for Enforcement of the Reclamation Act of 1902: An Economic Impact Analysis*, Feb. 1978, at vii. In Imperial County, the average irrigated farm has 716 acres. *Id.*, at 17.

104. See, generally, *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Rush v. Savchuk*, ... U.S. ...., 48 U.S.L.W. 4088 (1980).

This Court has distinguished finality in cases where a party has appeared, specially or generally, from cases where he has defaulted. Thus, a defendant who defaults for want of appearance may contend in a collateral proceeding that the previous court did not have sufficient jurisdiction over the *res* or that he did not receive adequate notice to adjudicate his rights in the *in rem* action. For example, in *Williams v. State of North Carolina,* 325 U.S. 226, 65 S.Ct. 1092 (1945), where in a divorce action the spouse had not appeared, Mr. Justice Frankfurter observed:

> It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties.

Similarly, in *City of New York v. New York N.H. & H.R. Co.,* 344 U.S. 293, 73 S.Ct. 299 (1952), the Court, though not expressly mentioning *res judicata* doctrine, permitted New York City to litigate its lien rights on railroad property subject to reorganization under the Bankruptcy Act in a prior proceeding. The court, speaking through Justice Black, held:

> Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. *See Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865. But when the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication. *See,* e.g., *Standard Oil Co. v. State of New Jersey,* 341 U.S. 428, 71 S.Ct. 822, 95 L.Ed. 1078. The case here is different. No such excuse existed to justify subjecting New York's claims to the hazard of forfeiture arising from "constructive notice" by newspaper.
>
> 344 U.S. at 296.

Should a party appear, even though only specially, to contest jurisdiction over his person[105] or the court's subject matter jurisdiction[106] that court has jurisdiction to decide its jurisdiction and its determination is not subject to later attack. And, even if a court lacks subject matter jurisdiction, if it obtains jurisdiction over the defendant, it has power to decide whether it has jurisdiction over the subject matter. *Stoll v. Gottlieb,* 305 U.S. 165 (1938). There, a creditor, secured by a guaranty unsuccessfully moved the bankruptcy court to vacate its order which had cancelled the guarantor's liability on the bond of the bankrupt debtor, claiming that the bankruptcy court had lacked subject matter jurisdiction to cancel the guaranty. So far as relevant to the present case, the Court stressed at several places in its opinion that the parties had actually contested the question of jurisdiction in the prior proceedings.

Even if this Court were convinced that the determination of the acreage limit question was essential to the *Hewes* judgment, the adverse impact of precluding respondents from litigating it now (for the first time) clearly outweighs the interest in finality at the root of collateral estoppel principles. If respondents are precluded, that ruling will vitiate congressional objectives to encourage family-sized farming in the Imperial Valley. Access there to the rich means of agricultural production will remain forever beyond the "little fellow" who lives there.

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105. *Baldwin v. Iowa State Traveling Men's Assn.,* 283 U.S. 522 (1931).

106. *Davis v. Davis,* 305 U.S. 32 (1938).

Owing to special circumstances, neither respondents nor the predecessors have ever had a full or fair opportunity to litigate the acreage limitation question. They were not notified, actually or constructively, that the acreage limitation was to become an issue in *Hewes*. Nowhere in the complaint did the District allege anything about the application of the acreage limitation. Nor did its prayer contain any request for relief in this regard.

V. Petitioners' Pleas for Fairness Are Claims That an Equitable Estoppel Lies. Estoppel, However, Cannot Be Asserted Under the Facts of This Case

Each of the petitioners makes extended arguments that to apply acreage limitation now would be unfair.[107] As the landowners say:

> The heart of this case is not a series of legal arguments . . . . It is the indisputable fact that fifty years ago the Government interpreted the Boulder Canyon Project Act to entitle Imperial Valley farms to enjoyment of their water rights free of acreage limitation. For 50 years, ordinary people in the Imperial Valley, farmers not legal scholars, relied on the Government's conduct without suspecting that one day lawyers' quibbles could overturn the premise on which their lives and livelihoods had been built up over the years. L. Br. 24.

Such an argument is one which essentially is a claim of equitable estoppel. But equitable estoppel can not ordinarily be asserted against the government.[108] *Utah Power and Light*

107. L. Br. 18-21, 24-27; D. Br. 8-10, 59-60; S. Br., 7-8.

108. While it is true that the government is not a party to this *appeal*, it was the plaintiff in the trial court; it is not a party to this appeal only because of the erroneous judgment of Solicitor General Griswold. See Respondents' Memo. In Opp. to Petitioners for Writ of Certiorari, pp. 10-11, n.3.

Moreover, the Government is before this Court as *amicus* vigorously arguing in support of respondents' claims. For these reasons, the principles by which equitable estoppel is or is not asserted against the Government ought to apply under these unusual facts.

Co. v. United States, 243 U.S. 389, 408-09 (1916); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 383-85 (1947); *United States v. State of California*, 332 U.S. 19, 39-40 (1947); *United States Imm. and Nat. Service v. Hibi*, 414 U.S. 5, 8 (1973). In *Utah Power and Light Co., supra*, a utility had, for over twenty years, constructed and operated "dams, reservoirs, pipe lines, power houses, transmission lines, and some subsidiary structures," 243 U.S. at 402, on federal forest lands. Neither a grant nor a license to do so had ever been sought or obtained. The utility did claim that "an understanding and agreement was had between [them and] . . . officers or agents of the United States" to allow them to operate on the land. Relying on that agreement, they invested substantial funds to develop the land and, therefore, claimed that the Government was estopped from questioning their right to remain. *Id.*, at 408. The Court said:

> [I]t is enough to say that the United States is neither bound or estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit . . . . A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane . . . from the ordinary private suit . . . .

In *United States v. California, supra*, at issue was the title to the three-mile strip of the Pacific Ocean off the shore of California. California had granted leases to many per-

sons and corporations authorizing the taking of oil, gas and other minerals, the value of which, while not specified, must have been substantial. California asserted equitable estoppel based on the acts of agents of the United States. The claim was rejected on the basis of reasoning similar to that in *Utah Power and Light*. 332 U.S. at 39-40.

While this Court has never recognized the claim of equitable estoppel, several of the courts of appeal, most notably, the Ninth Circuit, have. *United States v. Ruby Co.*, 588 F.2d 697, 701-05 (9th Cir. 1978) contains a lengthy exposition of how the claim is treated. The court explains that:

> [a]s applied to the government, it requires a balancing test. On the one side, the court must weigh the tendency of "the government's wrongful conduct . . . to work a serious injustice . . . ." Against this consideration, the court must balance the countervailing interest of the public 'not [to] be unduly damaged by the imposition of estoppel.' [Citation omitted.] These policy factors may militate against application of estoppel even though the technical elements of the doctrine are present.
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> *Id.*, at 703.

The facts before the court were that an 1877 fraudulent survey of lands bordering the Snake River in Idaho resulted in the omission of 14,000 to 16,000 acres of land for which the United States sought title, nearly 100 years later. The landowners asserted estoppel based upon the fact the government became aware of the error in 1922 and nevertheless refused to resurvey the property. The court refused to recognize an estoppel in light of the duty of the government to hold public lands in trust, relying on *United States v. California, supra.* The court said that "while one may be sympathetic with the landowners . . ., we must not be unmindful that the land involved belongs to all of the people of the United States." *Id.*, at 705.

Under the facts of this case, where the principal, if not exclusive, purpose of the reclamation laws was to foster family farms, and thereby enhance rural communities, the equitable estoppel balance tips decidedly in favor of furtherance of that purpose.

VI. Conclusion

The opinion of the court of appeals should be affirmed and the American value of family-sized farming preserved.[109]

Respectfully submitted,

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February 25, 1980
San Francisco, California

Appendix A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF IMPERIAL

No. 15460 Dept. 2

In the matter of the validation of a contract, dated December 1, 1932, entitled "Contract for Construction of Diversion Dam, main canal and appurtenant structures, and for delivery of water" between the United States of America and Imperial Irrigation District, the execution of which was authorized at an election held in said district on the 12th day of January, 1933.

John L. DuBois, Ira Aten, W. O. Blair, Burleigh Adams, and Mark Rose, as and constituting the Board of Directors of Imperial Irrigation District and Imperial Irrigation District,

Plaintiffs,

vs.

All persons, including all those in anyway interested or to be interested in that certain contract, dated December 1, 1932, entitled, "Contract for Construction of Diversion Dam, main canal and appurtenant structures, and for delivery of water", between the United States of America and Imperial Irrigation District, the execution of which was authorized at an election held in said district on the 12th day of January, 1933, and all those having or claiming any right, title or interest in or lien or claim upon the property within said district or any part thereof, and all real property within said district,

Defendants.

COMPLAINT IN REM TO DETERMINE THE VALIDITY OF AND AUTHORITY TO ENTER INTO AND EXECUTE CONTRACT WITH UNITED STATES.

The plaintiffs in the above entitled action, for cause of action allege:

I.

That said Imperial Irrigation District is and ever since the 25th day of July, 1911, has been an irrigation district duly and regularly organized and existing under and by virtue of the California Irrigation District Act, approved March 31, 1897, and the acts amendatory thereof or supplementary thereto. That said District is situated entirely within the County of Imperial, State of California, and is now and at all times since said July 25, 1911, has been acting as and exercising the rights of an irrigation district under the laws of the State of California, and that the boundaries of said District have not been changed since prior to July 1, 1931.

II.

That said John L. DuBois, Ira Aten, W. O. Blair, Burleigh Adams, and Mark Rose are and ever since prior to July 1, 1932, have been the duly elected or appointed, qualified and acting directors of said Imperial Irrigation District, and said John L. DuBois, Ira Aten, W. O. Blair, Burleigh Adams and Mark Rose, do now constitute and at all times since prior to July 1, 1932, have constituted the Board of Directors of said District, and the whole of said board. That said John L. DuBois is now and ever since prior to July 1, 1932, has been the duly appointed, qualified and acting President of said Board of Directors of Imperial Irrigation District. That F. H. McIver is now and ever since prior to July 1, 1932, has been the duly appointed, qualified and acting Secretary of said Board of Directors. That the office of said Board of Directors is now and at all times since prior to July 1, 1932, has been located in the City of El Centro, County of Imperial, State of California, which office is now and at all times since prior to July 1, 1932, has been the usual and regular place of meeting of said Board of Directors.

III.

That prior to December 5, 1932, there was submitted to Imperial Irrigation District and to its Board of Directors, as hereinabove alleged, a proposed contract entitled "Contract for the Construction of Diversion Dam, Main Canal and appurtenant Structures and for Delivery of Water", between the United States of America and Imperial Irrigation District for the construction of a diversion dam in the main stream of the Colorado River, and a main canal and appurtenant structures located entirely within the United States, connecting said diversion dam with the Imperial and Coachella Valleys in California, and for the repayment of the cost thereof as provided in the Reclamation law, being that certain Act of the Congress of the United States approved June 17, 1902, entitled "An Act appropriating the receipts from the sale and disposal of public land in certain States and Territories to the construction of irrigation works for the reclamation of arid lands" and the Acts Amendatory thereof and supplemental thereto, a true and correct copy of said proposed contract, as executed as hereinafter alleged, is attached hereto marked Exhibit "A" and by reference thereto made a part of this complaint.

IV.

That said proposed contract was executed on the 1st day of December, 1932, by the United States of America, acting for this purpose by Ray Lyman Wilbur, Secretary of the Interior, as provided by law.

V.

That, on, towit, the 5th day of December, 1932, at a regular adjourned meeting of the Board of Directors of Imperial Irrigation District, duly and regularly held on

said day at the usual and regular place of meeting of said Board, at least three members thereof being present and voting therefor, the said Board of Directors by resolution did approve the said proposed contract as to form.

VI.

That, thereafter, on towit, the 5th day of December, 1932, the Board of Directors of Imperial Irrigation District at a regular adjourned meeting of said Board, duly and regularly held on said day at the usual and regular place of meeting of said Board, at least three members thereof being present and voting therefor did by resolution direct the Secretary of said Board of Directors to submit the proposal to enter into a contract with the United States as embodied in said proposed contract with such plans and estimates of cost as had been made in connection therewith, to the State Engineer of the State of California for his examination and report as provided by law.

VII.

That thereafter and on the same day, towit, the 5th day of December, 1932, the Secretary of the Board of Directors of Imperial Irrigation District, agreeable to the resolution of said Board last above alleged, did submit said proposal to enter into contract with the United States as embodied in the said proposed contract, together with such plans and estimates of cost as had been made in connection therewith, to the State Engineer of the State of California, for his examination and report.

VIII.

That thereafter the State Engineer of the State of California, did make an examination of said proposal as em-

bodied in said proposed contract and of the said plans and estimates of cost as had been made in connection therewith and thereafter and on the 14th day of December, 1932, did make his report as provided by law in writing thereon to the Board of Directors of Imperial Irrigation District approving said proposal as embodied in said proposed contract and the plans and estimates of costs as had been made in connection therewith, and thereafter and on the 19th day of December, 1932, filed the said report and approval with the Secretary of said Board.

IX.

That on, towit, the 5th day of December, 1932, the Board of Directors of Imperial Irrigation District, at a regular adjourned meeting of said Board, duly and regularly held on said day, at the usual and regular place of meeting of said Board, at least three members thereof being present and voting therefor did by resolution direct the Secretary of said Board of Directors to submit the proposal to enter into a contract with the United States as embodied in said proposed contract with such plans and estimates of cost as had been made in connection therewith, to the California Districts Securities Commission for its examination and report.

X.

That thereafter and on the same day, towit, the 5th day of December, 1932, the Secretary of the Board of Directors of Imperial Irrigation District, agreeable to the resolution of said Board last above alleged did submit said proposal to enter into contract with the United States as embodied in said proposed contract, together with the plans and estimates of cost as had been made in connection therewith to the California Districts Securities Commission for its examination and report.

XI.

That thereafter the California Districts Securities Commission did make an examination of said proposal as embodied in said proposed contract, and of the said plans and estimates of cost as had been made in connection therewith, and thereafter and on towit the 16th day of December, 1932, did make its report as provided by law in writing thereon to the Board of Directors of Imperial Irrigation District, approving said proposal as embodied in said proposed contract and the plans and estimates of cost as had been made in connection therewith and thereafter and on the 19th day of December, 1932, filed said report and approval with the Secretary of said Board.

XII.

That the plans and estimates of cost made in connection with said proposal to enter into contract with the United States and so submitted with said proposal as embodied in said proposed contract to the State Engineer of the State of California, and to the California Districts Securities Commission, as hereinabove alleged, consists of an engineering report by H. J. Gault, dated May, 1931, and transmitted May 14, 1931, to the Chief Engineer of the Bureau of Reclamation at Denver, Colorado, and that said plans and estimates of cost as contained in said engineering report were made pursuant to the terms of a cooperative contract dated March 26, 1929, between Imperial Irrigation District, Coachella Valley County Water District, and the United States of America, acting for that purpose through Elwood Mead, Commissioner, Bureau of Reclamation. That said plans and estimates of cost were approved by the Board of Directors of Imperial Irrigation District by resolution at a regular adjourned meeting of said Board duly and

regularly held on the 29th day of December, 1932, at the usual and regular meeting place of said Board, at least three members thereof being present and voting therefor.

XIII.

That, on, towit, the 19th day of December, 1932, the Board of Directors of Imperial Irrigation District, at a regular adjourned meeting of said Board duly and regularly held on said day, at the usual and regular place of meeting of said Board, at least three members thereof being present and voting therefor, did by resolution determine and declare that the proposed plan of works as embodied in said proposed contract and the said plans and estimates of cost made in connection therewith as hereinabove alleged was satisfactory and that the said project was feasible and that it was for the best interests of said Imperial Irrigation District and the land owners and assessment payers and water users thereof that said proposed contract be entered into and executed by Imperial Irrigation District and that it was proposed by said Board of Directors that Imperial Irrigation District enter into and execute said proposed contract upon the execution thereof being authorized by the qualified electors of Imperial Irrigation District, as provided by law.

XIV.

That, on towit, the 19th day of December, 1932, the Board of Directors of Imperial Irrigation District, at a regular adjourned meeting of said Board duly and regularly held on said day at the usual and regular place of meeting of said Board, at least three members thereof being present and voting therefor, did by resolution order and call a special election to be held throughout Imperial Irrigation Dis-

trict on Thursday, the 12th. day of January, 1933, between the hours of six o'clock, A.M., and seven o'clock, P.M. of said day, in the manner provided by law for the purpose of submitting to the qualified electors of said Imperial Irrigation District the question whether or not said District should be authorized to enter into and execute said proposed contract and did by said resolution provide for notice of said special election as required by law and specified the form and contents of such notice, and did appoint for each precinct in said District from the electors thereof one inspector, one judge, and one clerk to constitute the Board of Election for such precinct at such special election and did in the order appointing the Board of Election designate the house or place within the precinct where said special election would be held and did order, designate and provide all matters and things necessary to the holding and conducting of said special election as required by law.

XV.

That pursuant to said resolution ordering and calling said special election notice of said special election in form and substance as specified in said resolution and as required by law, was given for the time and in the manner provided by law and the resolution and order of said Board of Directors calling said special election by the Secretary of the Board of Directors of Imperial Irrigation District, by posting said notice in three public places in each election precinct in said Imperial Irrigation District, and also in the office of said Board of Directors of said District (which notice among other things specified the polling places of each precinct) for at least twenty days prior to the date of said special election, a true and correct copy of said notice as so posted being attached hereto marked Exhibit "D" and by reference thereto made a part of this complaint, and also by publication of said notice in Imperial Valley Press, a newspaper of general circulation printed and published at El Centro in said County of Imperial, State of California, where the office of the Board of Directors of such district is kept, once a week for at least three successive weeks prior to the date of said special election, towit, on December 20, 1932, December 27, 1932, January 3, 1933, and January 10, 1933, a true and correct copy of said notice as so published is attached hereto marked Exhibit "C" and by reference thereto made a part of this complaint; such notice so posted and published specified among other things the time of holding the election and contained a statement of the maximum amount of money to be payable to the United States for construction purposes, cost of water supply and acquisition of property, exclusive of penalties and interest, together with a general statement of the property to be conveyed by said district.

XVI.

That, on towit the 12th day of January, 1933, between the hours of six o'clock, A.M., and seven o'clock, P.M., of said day said special election was duly and regularly held throughout Imperial Irrigation District in the manner provided by law and by the said resolution and order of the Board of Directors of said Imperial Irrigation District of December 10th. 1932, ordering and calling the same, and pursuant to notice thereof given as hereinbefore alleged; that said election was fairly conducted and the returns thereof duly transmitted by the respective officers of election of the respective election precincts and delivered to the Secretary of the Board of Directors of Imperial Irrigation District.

XVII.

That the ballots used at said special election were in the form provided by law and the said resolution and order of the Board of Directors of Imperial Irrigation District of December 19, 1932, as hereinabove alleged, and contained in the proposition to be voted upon as stated thereon a brief statement of the general purpose of said proposed contract and the amount of the obligation to be assumed, towit, a statement of the maximum amount of money to be payable to the United States for construction purposes, cost of water supply, and acquisition of property exclusive of penalties and interest, together with a general statement of the property to be conveyed by said District, all as provided by law and the resolution and order of said Board of Directors calling and ordering said special election and as contained in the notice thereof so posted and published, as hereinabove alleged. The statement on said ballot of the proposition to be and which was voted upon as hereinabove alleged was and is as follows, towit:

"Shall Imperial Irrigation District be authorized to enter into and execute that certain proposed contract with the United States of America entitled 'Contract for Construction of Diversion Dam, Main Canal, and Appurtenant Structures and for Delivery of Water', executed by the Secretary of the Interior on behalf of the United States, December 1, 1932, and approved as to form by resolution of the Board of Directors of Imperial Irrigation District December 5, 1932. The general purpose of said proposed contract is for the construction of a diversion dam (referred to in said proposed contract and commonly known as Imperial Dam) in the main stream of the Colorado River and the main canal and appurtenant structures (referred to in said proposed contract and commonly known as the All-American Canal) located entirely within the

United States connecting said diversion dam with the Imperial and Coachella Valleys in California to supply water from the Colorado River and the reservoir to be created by Hoover Dam to such lands in said valleys as may be located within the boundaries of Imperial Irrigation District, and to other lands under certain conditions, and for the payment to the United States of the cost of said works as provided in the reclamation law, and in said proposed contract. The amount of the obligation to be assumed by the district for construction purposes, cost of water supply and acquisition of property, exclusive of penalties and interest, shall not exceed $38,500,000 together with $768,000 still unpaid under Article 9 of the contract between the United States of America and Imperial Irrigation District, dated October 23, 1918, for a connection with Laguna Dam, and the said District shall acquire, where necessary, and shall convey to the United States such lands as may be required for right-of-way purposes for said works?"

XVIII.

That on Monday the 16th. day of January, 1933, being the first Monday after said special election, and the returns from each and every precinct in the said Districts having been duly and regularly received, the Board of Directors of Imperial Irrigation District met in regular adjourned session and as provided by law at its usual and regular place of meeting in the City of El Centro, California, at least three members thereof being present, for the purpose of canvassing the returns of said special election and the returns from each and every precinct in the said District being before said board, said board did at said time and place canvass said returns in public by opening the returns and estimating the vote of the said District for and against the proposal to enter into and execute the aforesaid con-

tract and found and by resolution declared, at least three members of said board voting therefor, that at said special election there were 5676 votes cast upon said proposal of which 4947 votes were "Contract—Yes" and 729 votes were "Contract—No" and that therefore 4947 votes were cast in favor of authorizing Imperial Irrigation District to enter into and execute said proposed contract, and 729 votes were cast against authorizing said District to enter into and execute said proposed contract. That more than two-thirds of all the votes cast for and against said proposal were cast in favor of authorizing Imperial Irrigation District to enter into and execute said proposed contract, whereupon the Board of Directors of Imperial Irrigation District did by said resolution find and declare that Imperial Irrigation District had at said special election been authorized to enter into and execute said proposed contract.

XIX.

That thereafter on the same day and at the same place and at the same meeting of said Board of Directors last above alleged, on, towit, the 16th. day of January, 1933, the Board of Directors of Imperial Irrigation District did by resolution, at least three members of said board voting therefor, authorize and direct John L. DuBois, President of the Board of Directors of Imperial Irrigation District to sign and execute said proposed contract in duplicate original for and on behalf of Imperial Irrigation District, and F. H. McIver, Secretary of said Board of Directors to attest the execution thereof and to affix thereto the seal of Imperial Irrigation District and make proper delivery of said contract to the Secretary of the Interior for the United States of America.

XX.

That thereafter and on the same day, towit, the 16th. day of January, 1933, the said John L. DuBois, as President of the Board of Directors of Imperial Irrigation District, duly signed and executed said proposed contract in duplicate original for and on behalf of Imperial Irrigation District, and F. H. McIver, as Secretary of the Board of Directors of Imperial Irrigation District thereupon attested the execution thereof and affixed thereto the seal of Imperial Irrigation District and made proper delivery of said contract to the Secretary of the Interior for the United States of America and that thereby at said time and place Imperial Irrigation District executed said proposed contract theretofore signed and executed by the United States of America acting for this purpose by Ray Lyman Wilbur, Secretary of the Interior, and dated the 1st. day of Dec. nineteen hundred thirty two, and thereupon the aforesaid proposed contract became and now is the contract of Imperial Irrigation District, a true and correct copy of said contract as so executed is attached hereto marked Exhibit "A" and by reference thereto made a part of this complaint.

XXI.

That by the acts and proceedings had and taken as hereinbefore alleged said Imperial Irrigation District was duly authorized to enter into and execute said contract, a copy of which is attached hereto marked Exhibit "A" and by reference thereto made a part of this complaint, and that each and all of the acts and proceedings for and in connection with the authorization and execution of said contract were and are valid and lawful, and all acts, conditions and things required by law to exist, happen and/or be performed

precedent to and in the authorization and execution of said contract did exist, happen and were performed in regular and due time, form and manner as required by law and said District was fully authorized and empowered to enter into and execute said contract and is fully authorized and empowered to perform and carry out the terms and conditions thereof on its part to be done, kept and performed and that said contract and each and every term thereof is within the power and authority of said Imperial Irrigation District to execute and carry out.

WHEREFORE plaintiff prays that this court after due notice and hearing determine adjudge and declare that that certain contract entitled "Contract for Construction of Diversion Dam, Main Canal and Appurtenant structures, and for delivery of water", dated December 1, 1932, between the United States of America and Imperial Irrigation District, copy of which is attached hereto marked Exhibit "A" and by reference thereto made a part of this complaint is and that each and every of the terms thereof are lawful and within the lawful powers of Imperial Irrigation District to make, enter into and carry out in accordance with its terms, and all proceedings leading up to and including the execution thereof have been performed in the manner required by law and that said contract is valid and legally binding upon said Imperial Irrigation District and that this court make and cause to be entered its judgment establishing and adjudging said contract to be valid and a legal obligation of said District and for such other, further and additional relief as is meet in the premises.

Chas. L. Childers and D. B. Roberts
Attorneys for plaintiffs.

STATE OF CALIFORNIA,
COUNTY OF IMPERIAL—SS.

John L. DuBois, being first duly sworn, deposes and says: That he is an officer of the plaintiff, Imperial Irrigation District, towit, the President of the Board of Directors thereof and also one of the plaintiffs in the above entitled action and that he makes this verification for and on behalf of said plaintiffs and all of them; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated on information or belief and as to those matters he believes it to be true.

John L. DuBois

SUBSCRIBED and sworn to before
me this 26th day of January, 1933.

(illegible)

Notary Public in and for the County of
Imperial, State of California

[Four exhibits are omitted here because of limitations of space: Exhibit "A" is the Contract for Construction of Diversion Dam, Main Canal, and Appurtenant Structures and for Delivery of Water, found at Dist. App. 177a; Exhibit "B" is Unenterred Public Lands and Enterred Lands for which No Final Certificate has been Issued; Exhibit "C" is Notice of Publication for Imperial Irrigation District Special Election on Question of Authorizing Execution of All-American Canal Contract; Exhibit "D" is Notice of Polling Places.]

Appendix B

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF IMPERIAL

No. 15460. Dept. 2.

In the matter of the validation of a contract, dated December 1, 1932, entitled "Contract for Construction of Diversion Dam, Main Canal and Appurtenant Structures, and for Delivery of Water" between the United States of America and Imperial Irrigation District, the execution of which was authorized at an election held in said District on the 12th day of January, 1933.

John L. DuBois, Ira Aten, W. O. Blair, Burleigh Adams and Mark Rose, as and constituting the Board of Directors of Imperial Irrigation District, and Imperial Irrigation District,

Plaintiffs,

vs.

All persons, including those who in anyway interested or to be interested in that certain contract, dated December 1, 1932, entitled: "Contract for Construction of Diversion Dam, Main Canal and Appurtenant Structures, and for Delivery of Water", between the United States of America and Imperial Irrigation District, the Execution of which was authorized at an election held in said District on the 12th day of January, 1933; and all those having or claiming to have any right, title or interest in or lien or claim upon the property within said District or any part thereof, and all real property within said District,

Defendants.

ANSWER AND OBJECTIONS OF CHARLES MALAN,

COMES NOW CHARLES MALAN,—and answers the COMPLAINT on file herein—and for answer and objections to the granting of the prayer of said COMPLAINT, says:

I

The said CHARLES MALAN alleges that he is the owner of more than one hundred and sixty (160) acres of land within the IMPERIAL IRRIGATION DISTRICT, and is an assessment payer and tax payer therein.

II

That the said CHARLES MALAN omits that the said proposed contract was signed by Ray Lyman Wilbur, Secretary of the Interior, on or about the First day of December, 1932; but DENIES that the name was signed as provided by law, or that the same was executed as provided by law, or that it ever became a contract between the said Secretary of the Interior and the said Irrigation District.

III

The said CHARLES MALAN denies that on the 18th day of December, 1932,—or at any other time, the Board of Directors of IMPERIAL IRRIGATION DISTRICT did, by resolution, order, or otherwise, call a special election to be held throughout the IMPERIAL IRRIGATION DISTRICT on Thursday, the 12th day of January, 1933, in the manner provided by law, for the purpose of submitting to the qualified electors of said IMPERIAL IRRIGATION DISTRICT, the question whether or not said District should

be authorized to enter into and execute said proposed contract; and DENIES that they did by said resolution provide for notice of said special election, as required by law; and DENIES that they did order, designate or provide all or any matters or things necessary to the holding and conducting of said special election, as required by law; but ALLEGES that said resolution and order was insufficient and illegal in the matters and particulars hereinafter pointed out and specified.

IV

That said CHARLES MALAN denies that, pursuant to the said resolution or order, and calling of said special election, or otherwise, notice of said special election, in form or substance, as required by law, was given for the time, or in the manner provided by law; but ADMITS that the notice attached to the COMPLAINT herein—and marked "EXHIBIT C",—was published at the time and in the manner alleged. CHARLES MALAN denies, however, that either the said resolution of said Board, or the said proposed notice, contained a statement of the maximum amount of money payable to the United States, or the amount of money to be payable to the United States for construction purposes, costs of water supply, or acquisition of property, exclusive of penalties, and interest, or a general statement —or any statement of the property to be conveyed by said District.

V

The said CHARLES MALAN admits that on the 12th day of January, 1933, a so-called election was held in the manner provided by the said resolution and order of the said BOARD OF DIRECTORS; but DENIES that the

same was duly or regularly held or that the same was fairly conducted, for the reason that neither the said order, resolution or notice correctly stated or gave a true and correct statement of the amount of the obligation to be assumed by the said IMPERIAL IRRIGATION DISTRICT; but ALLEGES that the amount of the obligation assumed by said District, if assumed by virtue of said contract, would amount to a much larger sum than Thirty-eight million, five hundred thousand Dollars ($38,500,000.) or the amount stated in the said order, resolution and notice; and CHARLES MALAN is informed and believes, and upon such information and belief ALLEGES: That the amount so assumed by the said IMPERIAL IRRIGATION DISTRICT, should said contract be valid, will amount to more than Ten Thousand Dollars ($10,000) in excess of the amount named in said order, resolution and notice, as a maximum amount of money to be payable to the United States.

VI

The said CHARLES MALAN denies that the ballots used at said special election were in the form provided by law, or that they contained a brief, or any, statement of the general purpose of said proposed contract, or the amount of the obligation to be assumed, or a statement of the maximum amount of money to be payable to the United States for construction purposes, costs of water supply and acquisition of property, exclusive of penalties and interest, or as provided by law; but he ADMITS that the ballots contain the language alleged in paragraph VII of the plaintiffs' COMPLAINT herein.

VII

The said CHARLES MALAN admits that the said contract was, on the 16th day of January, 1933, signed by the said JOHN L. DUBOIS, as President of said IMPERIAL IRRIGATION DISTRICT, and by the said S. H. McIVOR, as Secretary of the said BOARD OF DIRECTORS; but DENIES that the said contract was executed by the said IMPERIAL IRRIGATION DISTRICT, or by the said officers, or that any proper delivery or any delivery of the said contract was made to the Secretary of the Interior as a contract of the said Irrigation District; but ADMITS that a writing in the form of the contract set out herein, was signed by the said officers and sent to the said Secretary of the Interior; but DENIES that thereby, or at all, the said proposed contract became, or now is, the contract of IMPERIAL IRRIGATION DISTRICT.

VIII

The said CHARLES MALAN denies that by the acts or proceedings, or any of them, had or taken, as alleged in the COMPLAINT herein, or otherwise, the said IMPERIAL IRRIGATION DISTRICT was duly authorized, or authorized at all, to enter into or to execute said contract; or that each, or all, or any, of the acts or proceedings for or in connection with the alleged authorization or execution of said contract, were or are, valid or lawful; and DENIES that all or any acts, conditions or things required by law to exist happened, or to be performed, precedent to, or in the authorization or execution of said contract, did exist, or happened, or were performed, in regular or due time, form and manner, as required by law, or at all; and DENIES that said District was fully authorized or empowered or authorized or empowered at all, to enter into the execution of said contract, and DENIES that the District

is authorized or empowered to perform or carry out the terms or conditions thereof, on its part to be done, kept and performed, or any of such terms and conditions; and DENIES that said contract, or each, or any, or every of the terms thereof, or any term thereof, is within the power or authority of said IMPERIAL IRRIGATION DISTRICT to execute or carry out.

IX

That the ballots prepared by the said IRRIGATION DISTRICT Directors and used at said election, did not contain, nor did any of them contain, the amount of the obligation to be assumed by the said Irrigation District, by and through the entering into of such contract; that by the terms of the said contract, it was and is provided that the said Irrigation District agrees to repay to the United States expenditures incurred on account of any or all damages due to the existence, operation or maintenance of the diversion dam, and main canal described in said contract, the incurredness of which increases expenditures by the United States beyond said sum of Thirty-eight Million, Five Hundred Thousand Dollars, whereas the said notice of election, described in the COMPLAINT herein, and the ballots used at the said election, state the sum of Thirty-eight Million, Five Hundred Thousand Dollars as being the maximum amount of the obligation to be assumed by the said irrigation District; that if the works described and provided for in said contract are actually constructed, and used, as provided in the said contract, and if the dam described in said contract and called the "Imperial Dam" is built, as provided in said contract, the necessary result will be that the said works will damage the lands of sundry and numerous persons for many miles above the said proposed dam,

and will cause thousands of acres of land belonging to other persons to be flooded and water logged and damaged; said CHARLES MALAN is informed and believes, and upon such information and belief alleges that such damage will be more than Ten Million Dollars, such damage extending over and upon a great part of the lands embraced in the Palo Verde Irrigation District and that such damages will necessarily be incurred by the United States of America in the construction and maintenance of such dam and upon its payment by the United States of America, they will attach the obligation of the said IMPERIAL IRRIGATION DISTRICT to repay the same to the United States of America.

The said CHARLES MALAN further says that he is informed and believes and upon such information and belief alleges: That the language of the said contract providing for the repayment to the United States of expenditures incurred on account of any and all damages due to the expense, operation or maintenance of the said diversion dam, was inserted in said contract for the express purpose of including the damage which it was known would occur and result to the lands in the Palo Verde Irrigation District, aforesaid, by reason of the erection and maintenance of said dam; and that mention of such liability for damage was purposely omitted from the said notice of election and from the ballots at said election, for the purpose of deceiving the voters of the said IMPERIAL IRRIGATION DISTRICT, and causing them erroneously to believe that the total amount of obligation assumed to the United States by said contract was the sum of Thirty-eight Million, Five Hundred Thousand Dollars.

That said CHARLES MALAN further says that the said contract is illegal and beyond the power of the said Irrigation District to make, particularly in the following respects:

That by the terms of the said contract, the said Irrigation District Board attempts to abridge and limit its own legislative power given it by the Legislature of the State of California, to hereafter decide, as the occasion arises, whether it will admit other lands to the said District—and upon what terms; and further denies the power to the voters of said District to pass upon the inclusion of lands hereafter at the time when it is proposed by the owners of said lands, or a petition is filed by the owners of lands, to have the same included in said District.

That said CHARLES MALAN further says that the said contract is beyond the power of the said Irrigation District to make, for the reason that it binds the said Irrigation District to pay for the construction of the canal for the irrigation of lands which are now outside the said District and may never be a part of said District.

That the making of the said canal of the capacity of ten thousand cubic feet of water per second from Pilot Knob to Engineers Station No. 1907, is a capacity more than double the amount of any water which can possibly be used by the said IMPERIAL IRRIGATION DISTRICT, and is intended solely and entirely for the purpose of conveying waters to lands outside of said IMPERIAL IRRIGATION DISTRICT—and which may never be a part of the said IMPERIAL IRRIGATION DISTRICT.

That said contract is further illegal and beyond the power of the said Irrigation District in that it provides that a person outside the State of California shall have the right, for all time, to determine what land may be admitted to said Irrigation District, and what land may be excluded from said District, thereby attempting to cede away the legislative power granted to the Board of Directors of said

IMPERIAL IRRIGATION DISTRICT and the voters thereof, by the laws of the State of California; and also attempting to take from the Legislature of the State of California the right to provide what lands may be admitted into said Irrigation District and what lands may be excluded therefrom.

The said contract is further illegal and beyond the power of said District, for the reason that it provides, contrary to the laws of the State of California, for the payment of a part of the indebtedness of said Irrigation District upon a basis of area, instead of upon the basis of value, as is provided by the laws of the State of California.

That said contract is further illegal and beyond the power of the said Board of Directors of said Irrigation District to make in that it provides in part for the repayment of said obligation by tolls fixed by the Secretary of the Interior, and not by said Irrigation District directly, instead of in the method provided by the laws of the State of California;

That the said contract is further illegal and beyond the power of the Secretary of the Interior of the United States to enter into, for the reason that the laws of the United States require that all such contracts shall conform to the Reclamation Laws of the United States of America; and that said contract is contray [sic] to such reclamation Act in that it does not provide for the repayment to the United States of all the moneys expended by the United States, as is provided by the laws of the United States of America; and that it is especially provided by the Act under which it is attempted by the Secretary of the Interior to enter into said contract, that the Secretary of the Interior may only enter into such contract in accordance with the Reclamation Law.

That said contract is further illegal and beyond the power of even the Secretary of the Interior or the said District to enter into and make, for the reason that it is provided by the Reclamation Laws of the United States of America that the Secretary of the Interior shall not make any contract and that no water shall be furnished by the Secretary of the Interior to any canal built under the Reclamation Act, which water shall go to the owner of any tract of land larger than one hundred and sixty acres. That the said CHARLES MALAN is the owner of a tract of land in the said IMPERIAL IRRIGATION DISTRICT containing more than one hundred and sixty acres, and that by the terms of said contract the IMPERIAL IRRIGATION DISTRICT will rely upon, for its sole water supply, the terms of the said contract and will have no further source or supply of water, except water coming through the said canal provided in the said contract to be constructed.

That the lands of the said CHARLES MALAN are all under irrigation and have been supplied with water for more than twenty years and are valuable for farming purposes with irrigation, and would be without any value, whatever, if water cannot be obtained with which to irrigate the same.

X

That if the said contract is executed, or becomes effective, the said CHARLES MALAN will not be able to obtain water for his land, and one hundred and sixty acres thereof will become valueless; that said Irrigation District now has a valuable water right, and under its water right lands have been furnished with water in said District, and with an abundant supply thereof for more than twenty years;

that the execution of any such contract as that provided for, will cast a cloud upon the water right of the said CHARLES MALAN'S land, and if the Reclamation Law is obeyed by the said Irrigation District, the said CHARLES MALAN'S land will be deprived of water for irrigation purposes, and the said CHARLES MALAN will suffer irreparable damage.

XI

The said CHARLES MALAN further DENIES that any plans or specifications have ever been made in which are set forth the extent, size, nature, types of construction, locations, alignments or grades of the works to be constructed under the said contract; and ALLEGES that said contract is void for uncertainty and by reason of the fact that it is impossible to ascertain therefrom what is to be constructed, or what the size, extent, type of construction, or length of the same, is to be.

XII

CHARLES MALAN FURTHER DENIES each and every allegation in paragraph numbered Twenty-one of said COMPLAINT.

XIII

That the said pretended contract does not contain any statement of the estimated cost of construction of said canal and appurtenant work, nor refer to any estimate of such cost made by the Secretary of the Interior, and is in violation of the Reclamation Law of the United States and Acts amendatory thereto.

XIV

That it is provided in said contract that the cost of said canal and works to be paid for by the said IMPERIAL IRRIGATION DISTRICT shall not exceed the sum of Thirty-eight Million, Five Hundred Thousand Dollars, and that such provision and limitation is contrary to the laws of the United States, and is in excess of the powers and authority of the Secretary of the Interior and that the Secretary of the Interior, under the laws of the United States, has no right or authority to enter into any such contract or any contract, containing such limitation, or any limitation; and that such limitation particularly violates the Reclamation Law of the United States and Acts Amendatory thereto, and violates the provisions of Section 4-b of the Boulder Canyon River Project Act.

XV

That the said contract is further illegal, in this: That it provides that the said Canal therein provided from the Imperial Dam to Syphon Drop, a distance of about twenty (20) miles, shall contain capacity for two thousand cubic feet of water per second, and that to the extent of such capacity the said Canal shall be used solely for the use and benefit of Yuma Project of the United States Bureau of Reclamation and without cost to the lands to be irrigated thereby; and that said enlarged capacity will cost more than one hundred thousand dollars, and will constitute a gratis payment made by the said IMPERIAL IRRIGATION DISTRICT for the benefit of lands in the State of Arizona, and that there is no provision of law permitting or authorizing the said IMPERIAL IRRIGATION DISTRICT to contract any such indebtedness.

XVI

THAT THE SAID CONTRACT IS FURTHER ILLEGAL, in this: That it provides that claims of the United States, arising out of said contract, shall have priority over all other claims, thereby making such claim of the United States superior to the taxes for county, city and school purposes in the said Irrigation District and superior to the lien for taxes levied to pay the principal and interest upon bonds already issued by said IMPERIAL IRRIGATION DISTRICT, amounting to more than Fourteen Million Dollars. That no such claim or lien is allowed or permitted by the laws of the State of California, and contravenes Section 16 of Article I of the Constitution of the State of California, and also the provisions of Section VI of Article 13 of the Constitution of the State of California.

WHEREFORE, the said CHARLES MALAN PRAYS: That a judgment be entered herein that the said contract and each every provision thereof be declared illegal, invalid and not obligatory upon the said Irrigation District.

M. W. CONKLING
Attorney for Charles Malan

STATE OF CALIFORNIA }
County of San Diego } ss

M. W. CONKLING being first duly sworn, deposes and says:

That he is the attorney for CHARLES MALAN in the within-entitled matter; that he has read the foregoing ANSWER AND OBJECTIONS, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information and belief and that as to those matters he believed it to be true; That he makes this verification for the reason that the said CHARLES MALAN resides out, and is out, of the County where affiant is and has his office; and that affiant is familiar with all the facts.

M. W. CONKLING

SUBSCRIBED and sworn to before me
this 28th day of February, 1933.

[SEAL]

LUCY A. AUST
NOTARY PUBLIC in and for the County of
San Diego, State of California.

[Exhibits are omitted because of limitations of space.]

see

7 9

4 2 5

4 3 5

IMPERIAL IRRIGATION DISTRICT

IMPERIAL COUNTY CALIFORNIA

IRRIGATION SYSTEM

IMPERIAL UNIT

JANUARY 1970

R.F. CARTER
GENERAL MANAGER

LEGEND

- CANALS & LATERALS
- PUMP CANALS
- CONTROL STRUCTURES
- SIPHONS & CHECKS
- BRIDGES
- HIGHWAYS
- RAILROADS
- CONC. LINED LATERALS
- RIVERS
- IMPERIAL UNIT BOUNDARY
- TOWNSHIP & RANGE LINES
- SECTION LINES
- ¼ SECTION LINES
- TRACT LINES
- LOT LINES
- SECTION NUMBERS
- TRACT NUMBERS
- LOT NUMBERS

Exhibit DJ

SALTON SEA

WATER SURFACE ELEV. -232.10 DEC. 1, 1969

BROCKMAN
BROWN
BRYANT
ELMORE
GUTIERREZ
KUBLER
NILSON
SHANK
SINGH

R. 11 E. R. 12 E. R. 13 E. R. 14 E. R. 15 E. R. 16 E.

T. 9 S. T. 10 S. T. 11 S. T. 12 S. T. 13 S. T. 14 S. T. 15 S. T. 16 S. T. 16½ S. T. 17 S.

RIVERSIDE COUNTY
IMPERIAL COUNTY

BERTRAM POPE FRINK WESTER HOLTVILLE FLOWING WELLS VENTURA CARGILLIA BRAWLEY EL CENTRO HEBER PLASTER CITY CALEXICO MEXICALI

M E X I C O

Dwg. No. 8223